(1)

No. 89-6332-CSY
Status: GRANTED
CAPITAL CASE

Title: Robert S. Minnick, Petitioner
v.
Mississippi

Docketed:
December 19, 1989

Court: Supreme Court of Mississippi

Counsel for petitioner: Smith,Clive A. Stafford, Abrams,Floyd

Counsel for respondent: White Jr.,Marvin L.

Entry	Date	Note	Proceedings and Orders
1	Dec 19 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 24 1990		Order extending time to file response to petition until February 25, 1990.
5	Feb 26 1990		Order further extending time to file response to petition until March 5, 1990.
6	Mar 6 1990		Order further extending time to file response to petition until March 7, 1990.
7	Mar 7 1990		Brief of respondent Mississippi in opposition filed.
8	Mar 15 1990		DISTRIBUTED. March 30, 1990
9	Mar 15 1990	X	Reply brief of petitioner Robert Minnick filed.
11	Apr 2 1990		REDISTRIBUTED. April 13, 1990
13	Apr 16 1990		REDISTRIBUTED. April 20, 1990
15	Apr 23 1990		Petition GRANTED.
			**********
17	May 14 1990		Order extending time to file brief of petitioner on the merits until June 28, 1990.
18	Jun 27 1990		Joint appendix filed.
19	Jun 28 1990		Brief of petitioner Robert S. Minnick filed.
20	Jun 28 1990	G	Motion of Mississippi State Bar for leave to file a brief as amicus curiae filed.
21	Jul 23 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 3, 1990. (4TH CASE)
23	Jul 30 1990		Order extending time to file brief of respondent on the merits until August 20, 1990.
24	Aug 10 1990		CIRCULATED.
25	Aug 17 1990		Order further extending time to file brief of respondent on the merits until August 27, 1990.
26	Aug 20 1990	X	Brief amicus curiae of United States filed.
27	Aug 27 1990	X	Brief of respondent Mississippi filed.
28	Aug 30 1990		Motion of Mississippi State Bar for leave to file a brief as amicus curiae GRANTED.
30	Sep 13 1990	G	Motion of Mississippi State Bar for leave to file an amended amicus curiae brief filed.
29	Sep 25 1990		Record filed.
		*	certified record, MS Supreme Court.
33	Sep 27 1990	X	Reply brief of petitioner Minnick filed.
32	Oct 1 1990		Motion of Mississippi State Bar for leave to file an amended amicus curiae brief GRANTED.
34	Oct 3 1990		ARGUED.

1PP

IN THE
SUPREME COURT OF THE UNITED STATES

89-6332

October Term, 1988

No. 89-____

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE SUPREME COURT OF THE UNITED STATES

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Robert Minnick hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Mississippi, which affirmed his conviction and sentence of death.

QUESTION PRESENTED

WHETHER, once an accused has expressed his desire to deal with law enforcement officers only through counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-____

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Robert Minnick hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Mississippi, which affirmed his conviction and sentence of death.

QUESTION PRESENTED

WHETHER, once an accused has expressed his desire to deal with law enforcement officers only through counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?[1]

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is reprinted in full in *Exhibit A*. See Minnick v. State, ___ So. 2d ___, No. DP-79 (Miss. 1988) (not yet reported). Justice Robertson dissented on the issue presented in this petition. Id. (Robertson, J., dissenting). Mr. Minnick filed a petition for rehearing, and the Supreme Court ordered further briefing on one issue: Whether a recent, contrary interpretation of Edwards v. Arizona

1. See Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

by the Georgia Supreme Court required reevaluation of the Court's decision. See *Letter of the Court (March 2, 1989)* (attached as *Exhibit B*, citing Roper v. State, 375 S.E.2d 600 (Ga. 1989)).[2] Mr. Minnick's petition was eventually denied by a four-to-three vote on October 25, 1989, without further written opinion, and without resolution of the conflict with the Georgia Supreme Court opinion. See *Exhibit C* (Robertson, Prather & Sullivan, JJ., dissenting).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Prior to trial, Petitioner filed a motion to suppress his statement, predicated on the Fifth and Sixth Amendments to the United States Constitution. (Tr. 20)[3] The motion was overruled. (Tr. 49) Prior to the admission of the statement at trial, Petitioner renewed his motion, citing Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). A hearing was held on his motion, and the statement admitted. (Tr. 958)

Petitioner raised the constitutional issues to the Mississippi Supreme Court. See *Brief of Appellant, at 8-14 (2/16/88)*. The Court denied relief on the merits. See Minnick v. State, Slip Op. at 7-8.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on December 14, 1988. A timely petition for rehearing was denied on October 25, 1989. The jurisdiction of the Supreme Court is invoked under *28 U.S.C. § 1257* on the ground that a right or privilege of the defendant is claimed under the Constitution of

2. A petition for certiorari to the Supreme Court of Georgia is pending with this Court in that case. See Georgia v. Roper, 45 Cr. L. Rptr. 4086 (*filed* June 5, 1989).

3. All references to the record on appeal will appear as "(Tr. ___)".

the United States which right has been denied by the State of Mississippi.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that --

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . nor be deprived of life . . . without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part, that --

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in pertinent part, that --

> Excess bail shall not be required . . . nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that --

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal procection of the laws.

STATEMENT OF THE CASE

The pertinent facts may be briefly summarized. Petitioner was arrested in California on August 22, 1986. Extradition proceedings were immediately begun with a view to returning him to Mississippi to face capital murder charges. On August 23, 1986, Petitioner was interviewed by the F.B.I., whereupon he invoked his right to counsel. All questioning ceased.

Counsel was appointed for the extradition proceedings, and Petitioner met with him after the F.B.I. interview. Counsel advised Petitioner not to speak to anyone regarding the pending capital charges.

On August 25, 1986, Mississippi Deputy J.C. Denham, of the Clarke County Sheriff's Department, flew to California. Deputy Denham initiated an interrogation of Petitioner which resulted in an inculpatory statement. This was the centerpiece of the evidence used against Petitioner at his trial.

REASON FOR GRANTING THE WRIT

This Court should grant certiorari to resolve an important question left open by an apparent ambiguity in Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). See also Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

According to one interpretation of the "bright line" rule of Edwards, once there has been an assertion of the Fifth Amendment right to counsel "the interrogation must cease," Edwards v. Arizona, 451 U.S. at 485, and all further police-initiated questioning must be done with counsel present. This edition of the Edwards rule has been adopted by various courts to "prevent the police from effectively 'overriding' a defendant's assertion of his Miranda rights by 'badgering' him into waiving those rights." Michigan v. Jackson, 475 U.S. at 638 (Rehnquist, J., dissenting).

Along with certain other courts, the Mississippi Supreme Court has adopted a different interpretation of Edwards, holding that an assertion of the Fifth Amendment right to counsel only precludes police-initiated interrogation of the accused "until counsel has been made available to him. . . ." Minnick v. State, Slip Op. at 7 (quoting Edwards v. Arizona, 451 U.S. at 484-85 (emphasis supplied)). Once counsel has been made available for a consultation with the accused, it is once again open season for police-initiated interrogation.

Whatever the merits of either rule, each interpretation has its adherents in the lower courts, both state and federal. This Court should provide an authoritative resolution to the question.

QUESTION PRESENTED FOR REVIEW

I. **"HIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, ONCE THE ACCUSED HAS ASSERTED HIS RIGHT TO COUNSEL AND THE ACCUSED HAS BEEN PERMITTED ONE FLEETING MEETING WITH AN ATTORNEY, THE AUTHORITIES MAY INITIATE FURTHER INTERROGATION IN ORDER TO SECURE AN INCRIMINATING STATEMENT?**

The lower courts are in disarray concer..ng the proper interpretation of Edwards. As noted below, there are basically two schools of thought.

According to the first school of thought, when an accused invokes his Fifth Amendment right to counsel, the police may never reinitiate interrogation, even if the opportunity to consult with counsel has been provided. Thus the police may not simply return to the cell after every attorney-client meeting until the accused finally breaks down and confesses.

Mississippi belongs to the second school, along with several other courts, in holding that when the accused invokes his Fifth Amendment right to counsel he must be given at least one opportunity to consult with counsel. After such a consultation has taken place, the police are free to reinitiate interrogation, at least until the accused asserts the right again.

A. THE CONFLICTING DECISIONS IN THE COURTS BELOW.

Many lower courts have differed on the proper interpretation of Edwards v. Arizona over the eight years since this Court announced its decision.

(i) The Conflict between the Mississippi Supreme Court and the Georgia Supreme Court noted in Petitioner's case.

As noted by the Mississippi Supreme Court in ordering further briefing in this case, the Georgia Supreme Court has held that the police may not resume interrogation of the accused as soon as the lawyer walks out of the attorney-client conference. Roper v. State, 375 S.E.2d 600 (Ga. 1989), cert. pending sub nom. Georgia v. Roper, 45 Cr. L. Rptr. 4086 (*filed* June 5, 1989).

Considering a fact pattern almost identical to Petitioner's,[4] and citing Edwards, the Georgia Supreme Court reversed the conviction in Roper because a confession had been exacted in violation of the Fifth Amendment.

In contrast, the Mississippi Supreme Court borrowed language from Edwards to justify reinitiation of interrogation as soon as the requested attorney-client consultation is completed. Indeed, it is worth quoting the Mississippi Supreme Court's analysis of the claim in detail:

> While it is true that [Petitioner] Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him. In this kind of situation, the Edwards bright-line rule as to initiation does not apply. The key phrase in Edwards which applies here is "until counsel has been made available to him." Id. at 485. ***Since counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied.*** Therefore, this aspect of Minnick's argument is without merit.

Minnick v. State, ___ So.2d ___, No. DP-79, Slip Op. at 7-8 (Miss. 1988) (footnote omitted) (emphasis supplied).

(ii) The conflicts in the Federal Courts.

The same conflict exists among the federal courts of appeal. The Seventh Circuit sides with Georgia. See United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied sub nom. Fairman v. Espinoza, 483 U.S. 1010, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987). In that case, the accused requested counsel, and the public defender was appointed at arraignment to assist him. Id. at 118. Espinoza consulted with counsel, and was returned to the jail where he later gave a confession to an Assistant District Attorney. The court ruled that "because the

4. The operative facts in Roper are virtually identical to those found by the Mississippi Supreme Court in Petitioner's case. Roper, like Petitioner, had requested counsel. Roper, 375 S.E.2d at 602; Minnick, Slip Op. at 6. Both Roper and Petitioner had the chance to consult with counsel. Roper, at 603; Minnick, at 7-8. Subsequently, a state investigating officer approached the accused and initiated interrogation. Roper, at 602. In both cases, the trial court admitted the confession. In Roper, the conviction was reversed; in Minnick, the conviction was affirmed.

state initiated the interrogation, Espinoza was incapable of waiving his previously invoked right to counsel." Id. at 126.[5] Cf. United States v. D'Antoni, 856 F.2d 975, 982 (7th Cir. 1988); United States ex rel. Adkins v. Greer, 791 F.2d 590, 595 (7th Cir.), cert. denied, 479 U.S. 989, 107 S. Ct. 584, 93 L. Ed. 2d 586 (1986).[6]

In contrast, the Fourth Circuit recited the following "rule" of Edwards:

> The Supreme Court has made it quite clear that . . . an accused, once he has requested counsel, must be left alone ***until he has had the opportunity to consult with counsel.*** In Edwards v. Arizona . . . the Supreme Court constructed a prophylactic rule of considerable impermeability:
>
> > [A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel has been made avail-

5. The Court expressly rejected Espinoza's Sixth Amendment claim, id. at 120, and rested the decision solely on the Fifth Amendment.

6. The Second Circuit has suggested agreement with the Seventh, albeit in *dicta*:

> [O]nce an accused has "expressed his desire to deal with the police only through counsel, [he] is ***not subject to further interrogation*** . . . unless the accused initiates further communication. . . ."

United States v. Colon, 835 F.2d 27, 30 (2d Cir. 1987) (citing Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931, 1934, 95 L. Ed. 2d 458 (1987) (quoting Edwards v. Arizona, 451 U.S. at 484-85)). See also Terry v. LeFevre, 862 F.2d 409, 412 (2d Cir. 1988) ("once counsel is requested, all interrogation must cease until an attorney is present"). The same rule has been recited in *dicta* by certain decisions in the Ninth and Eleventh Circuits. See, e.g., Neuschafer v. Whitley, 816 F.2d 1390, 1391 (9th Cir. 1987) (*per* Kennedy, J.) ("Edwards bars the use of any confession obtained after the suspect has requested a lawyer, unless the suspect has initiated the interview"); Smith v. Endell, 860 F.2d 1528, 1529 (9th Cir. 1988) ("Not only must all questioning stop when a suspect expresses his desire for counsel, but questioning can be resumed only if the suspect himself initiates further communication"); Owen v. State of Alabama, 849 F.2d 536, 538 (11th Cir. 1988) ("when a person requests an attorney during custodial interrogation, ***all*** questioning must cease until an attorney is present.") (emphasis supplied); cf. United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987); People of Territory of Guam v. Ichiyasu, 838 F.2d 353, 357 (9th Cir. 1988); United States v. Helmandollar, 852 F.2d 498, 501 (9th Cir. 1988); Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); see also, Acquin v. Manson, 643 F. Supp. 914, 920 (D. Conn. 1986); United States v. Hill, 701 F. Supp. 1522, 1524 (D. Kan. 1988); United States v. Rafferty, 710 F. Supp. 1293, 1295 (D. Hawaii 1989).

able to him, unless the accused himself initiates further communication. . . .

Wilson v. Murray, 806 F.2d 1232, 1237 (4th Cir. 1986) (emphasis supplied) (quoting Edwards v. Arizona, 451 U.S. at 485).[7] In *dicta*, the Third, Fifth and Sixth Circuits have recited the same standard. Vujosevic v. Rafferty, 844 F.2d 1023, 1029 n.2 (3rd Cir. 1988); Plazinich v. Lynaugh, 843 F.2d 836, 838 (5th Cir. 1988);[8] Wernart v. Arn, 819 F.2d 613, 615 (6th Cir. 1987); Boles v. Foltz, 816 F.2d 1132, 1135 (6th Cir. 1987).[9]

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7. The Fourth Circuit ultimately granted relief in Wilson on the strength of the Sixth Amendment rule announced in Michigan v. Jackson, noting that the "even stricter rule" of Jackson precluded any waiver of the Sixth Amendment right to counsel in police-initiated interrogation. Id. at 1237. In contrast, the Fourth Circuit read Edwards as permitted a "case-by-case analysis" of such a waiver. Id.

8. Respondent argued in the court below that the Fifth Circuit had adopted this interpretation of Edwards v. Arizona. *See Response to Petition for Rehearing at 3-4 (Feb. 13, 1989)* (citing Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1059, 98 L. Ed. 2d 1021 (1988)). This is an overstatement of the case, since the Fifth Circuit has not had to deal with the precise question presented in this case. However, the court has quoted the passage from Edwards suggesting that an assertion of the right to counsel only precludes "further interrogation by the authorities ***until counsel has been made available to him***, unless the accused himself initiates further communication. . . ." Plazinich v. Lynaugh, 843 F.2d at 838 (emphasis supplied) (quoting Edwards v. Arizona, 451 U.S. at 485). Relying on this passage, the court held that "the Edwards rule is to be strictly and narrowly applied[.]" Plazinich v. Lynaugh, 843 F.2d at 838 (citing Griffin v. Lynaugh, 823 F.2d at 862).

9. The Mississippi rule has been recited by some lower federal courts. For example, the court in Gray v. Rose, 627 F. Supp. 7 (M.D.Tenn.), aff'd 779 F.2d 50 (6th Cir. 1985), cert. denied, 476 U.S. 1184, 106 S. Ct. 2920, 91 L. Ed. 2d 548 (1986), held:

> Here, there was no violation of the rule of Edwards; that rule implicates a situation wherein police initiate further interrogation of a suspect after he has requested counsel but before counsel has been provided.
>
> * * *
>
> Edwards . . . emphasized the necessity of counsel's being made available or the accused's having access to counsel prior to being questioned by police, rather than holding that, once the accused has requested counsel, he may be interrogated thereafter only in the ***presence*** of counsel.

Id. at 10-11 (emphasis in original). See also United States v. Yan, 704 F.Supp. 1207, 1211 (S.D.N.Y. 1989); Romine v. Duckworth, 648 F.Supp. 60, 64 (N.D.Ind. 1986); United States v. Espinal-Cordona, 635 F.Supp. 330, 332 (D.N.J. 1986).

(iii) The conflict in the State courts.

Turning to the state courts, several of the fifty states have sided with Georgia. For example, the facts of State v. Preston, 555 A.2d 360 (Vt. 1988), are indistinguishable from Petitioner's case. Preston was arrested in Florida on charges stemming from an incident in Vermont, and he invoked his right to counsel. Id. at 361. Preston thereupon consulted with counsel provided for him. Id. Relying on the Fifth Amendment, the court ordered the suppression of a statement obtained in the subsequent police-initiated interrogation. Id. at 361 n.*.

In Bussard v. State, 747 S.W.2d 71 (Ark. 1988), the Arkansas Supreme Court considered a Fifth Amendment[10] challenge to the admission of a confession. Bussard had retained a lawyer, and had consulted with him, when the Sheriff initiated the interrogation which resulted in an inculpatory statement. The court ordered the confession suppressed.

The Missouri courts have reached the same conclusion under closely analogous facts. See State v. Perkins, 753 S.W.2d 567 (Mo. App. 1988). Karl Perkins told the police that he had an attorney, and the attorney subsequently informed the police that Perkins would make no statements. Id. at 570. Through an informant, the police subsequently questioned Perkins and elicited a statement. Id. The court reversed, ordering the statement suppressed.[11] Accord State v. Hartley, 511 A.2d 80, 93 (N.J. 1986); State v. Warndahl, 436 N.W.2d 770, 775 (Minn. 1989); People v. Trujillo, 773 P.2d 1086, 1092-93 (Colo. 1989).[12]

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10. Bussard rests on alternate Sixth Amendment grounds.

11. Again, a Sixth Amendment issue was raised, but the court explicitly rested its conclusion solely on the Fifth Amendment. Id. at 569.

12. The other state courts have reached this interpretation of Edwards only in *dicta*. See, e.g., State v. Mathieu, 449 So. 2d 1087, 1019 (La. 1984) (when accused expresses a desire to deal through counsel, further interrogation can only occur "where the accused himself initiates further communication, exchanges or conversations with police"); People v. Christomos, 172 Ill. App. 3d 585, 122 Ill. Dec. 669, 527 N.E.2d 41, 47 (1988); State v. Benner, 533 N.E.2d 701, 711-12 (Ohio 1988); State v. Grieb, 761 P.2d 970, 972 (Wash. App. 1988); Stanford v. Commonwealth, 734 S.W.2d 781, 788 (Ky 1987), aff'd on other grounds sub nom. Stan-

(continued...)

On the other hand, siding with the Mississippi Supreme Court, Utah has held that when the accused invokes the right to counsel, all questioning must cease, but:

> Questioning may continue once counsel has been made available to [the] defendant or if [the] defendant himself initiates further communication with police . . . .

State v. Griffin, 754 P.2d 965, 968 n.3 (Utah App. 1988) (emphasis supplied).

The South Carolina Supreme Court has also held that interrogation may be initiated again when the accused has been allowed access to counsel:

> When an accused asserts his right to counsel, he is not subject to further interrogation until counsel is made available to him or he initiates further communication with the police. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); * * *. Here, after appellant initially requested an attorney, one was provided and the police did not contact [the accused] until two days later . . . . ***Appellant had consulted with his attorney and was aware of his right to have counsel present. Therefore, the performance of the polygraph exam did not violate Edwards v. Arizona, supra.***

State v. Grizzle, 358 S.E.2d 388, 389 (S.C. 1987) (emphasis supplied).

While the Florida Supreme Court has not expressly chosen between the two standards, Justice Shaw has expressed his opinion, concurring in Henderson v. Dugger, 522 So. 2d 835 (Fla 1988):

> [M]y reading of Michigan v. Jackson . . . is that it permits the state to reinitiate questioning after an accused requests appointment of . . . counsel *provided* the state furnishes such counsel and affords the accused an opportunity to consult with counsel. * * * I read Edwards v. Arizona . . . the same way. This qualifier is important here because there is no question that the state furnished such counsel prior to the questioning of petitioner.

Id. at 838 (emphasis in original). See also Wells v. State, 540 So. 2d 250, 252 (Fla. App. 4, 1989) ("Upon assertion of his right

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12. (...continued)
ford v. Kentucky, 492 U.S. ___, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

to counsel, law enforcement officials cannot subject the defendant to further questioning until an attorney has been appointed for him and [he] has been accorded the opportunity to consult"); cf. Kyser v. State, 533 So. 2d 285 (Fla. 1988).[13]

B. THE RULE ANNOUNCED BY THIS COURT IN EDWARDS WAS INTENDED TO PROVIDE A PROPHYLACTIC PROTECTION AGAINST UNCOUNSELLED INTERROGATION, AND SHOULD NOT PERMIT THE REINITIATION OF QUESTIONING AFTER ONE FLEETING COMMUNICATION BETWEEN ATTORNEY AND CLIENT.

The question before this Court is whether the prohibition against initiating contact with an accused after he has invoked the right to counsel is lifted once the accused has had one conversation with an attorney.

In the context of the Sixth Amendment right to counsel, this question would obviously not arise. Once the Sixth Amendment right to counsel has attached at arraignment, every other stage of the process will necessarily be a "'critical stage' at which the Sixth Amendment applies." Michigan v. Jackson, 475 U.S. at 630.

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13. Among the other state courts, most Edwards cases have been resolved on other grounds, and the "rule" applied in these decisions must be regarded as *dicta*. However, various states have quoted the language in Edwards as precluding further police-initiated contact with the accused only "until counsel has been made available to him. . . ." Seawright v. State, 479 So. 2d 1362, 1366 (Ala. Cr. App. 1985) (quoting Edwards v. Arizona, 451 U.S. at 485). Accord State v. Anderson, 553 A.2d 589, 592 (Conn. 1989); DeShields v. State, 534 A.2d 630, 652 (Del. Supr. 1987); Smith v. United States, 529 A.2d 312, 316 (D.C.App. 1987); Green v. State, 558 A.2d 441, 444 (Md. App. 1989); In re Bruyette, 556 A.2d 568, 569 (Vt. 1988); State v. Curtiss, 552 A.2d 530, 532 (Me. 1988); People v. Crusoe, 170 Mich. App. 403, 427 N.W.2d 634, 636 (1988); State v. Gil, 543 A.2d 1296, 1303 (R.I. 1988); State v. Allen, 372 S.E.2d 855, 860 (N.C. 1988); State v. Norris, 768 P.2d 296, 300 (Kan. 1989); State v. Wickey, 769 P.2d 208, 211 (Or. App. 1989); State v. Stewart, 765 P.2d 1320, 1323 (Wash. App. 1989); State v. Gunnoe, 374 S.E.2d 716, 718-19 (W.Va. 1988); State v. Smith, 747 S.W.2d 678, 681 (Mo. App. 1988); State v. Thompson, 768 S.W.2d 239, 247 (Tenn. 1989). Some confusion exists in Texas. In Higginbotham v. State, 769 S.W.2d 265 (Tex. App. 1989), the court initially cited Miranda and Edwards for the proposition that after a request for a lawyer, "counsel must be provided in order to advise a defendant 'during any interview with police officers or attorneys representing the state.'" Id. at 269 (quoting Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966)). However, although ultimately holding that the statement should have been suppressed, the court later implied that even after the invocation of the right to counsel, the right can be effectively waived even in police-initiated questioning. Id. at 271.

In Jackson, the State argued that the Fifth Amendment rule of Edwards should not apply to the Sixth Amendment. Id. at 631. This Court rejected the notion, holding that "the Sixth Amendment right to counsel at postarraignment interrogation requires at least as much protection at the Fifth Amendment right to counsel at any custodial interrogation." Id. at 632.

In order to justify the rule applied by the Mississippi Supreme Court in this case, the State must now argue that the Sixth Amendment rule in Jackson should not apply to the Fifth Amendment right announced in Edwards.

Such a ruling simply makes no sense. The "'prophylactic rule' [of Edwards] was deemed necessary to prevent the police from effectively 'overriding' a defendant's assertion of his Miranda rights by 'badgering' him into waiving those rights. . . ." Michigan v. Jackson, 475 U.S. at 638 (Rehnquist, J., dissenting). Allowing the police to reinitiate interrogation every time the defense attorney leaves the room permits precisely the "badgering" which Edwards sought to prevent.

On would think that any ambiguity in the meaning of Edwards would have been laid to rest in Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), which correctly characterized Edwards as creating a *per se* rule, with no exception when counsel had briefly consulted with the accused.[14] Justice White wrote:

> Edwards established a new test for when . . . waiver would be acceptable once the suspect had invoked his right to counsel: ***the suspect had to initiate the subsequent communication.***

Id. 465 U.S. at 646 (emphasis supplied).

Thus one might think the issue clear. However, there is a difference of opinion in the lower courts concerning the proper construction of Edwards. Therefore, this Court should grant

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14. Indeed, Stumes did speak "with his attorney, who told him not to make any statements. . . ." Id. 465 U.S. at 639. However, this occurred prior to the moment when he invoked his Fifth Amendment right to counsel.

certiorari to resolve the conflict. See *Supreme Court Rule § 17(b)*.

CONCLUSION

WHEREFORE, Petitioner Robert Minnick respectfully suggests that this Court should grant certiorari to review the decision of the court below.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day mailed a copy of the aforegoing document to the following person:

Marvin L. White, Jr.
Assistant Attorney General,
P.O. Box 220,
Jackson, Ms. 39205.

This, the 19th day of December, 1989.

EXHIBIT A

IN THE SUPREME COURT OF MISSISSIPPI FILED DEC 14 1988

NO. DP-79

ROBERT S. MINNICK

2658A

v.

STATE OF MISSISSIPPI

EN BANC.

DAN LEE, PRESIDING JUSTICE, FOR THE COURT:

On September 9, 1986, Robert S. Minnick was indicted by the Grand Jury of Clarke County, Mississippi, for two counts of capital murder, one for the murder of Lamar Lafferty while engaged in the crime of robbery, and the other for the murder of Donald Ellis Thomas while engaged in the crime of robbery. Minnick was also indicted as an habitual offender on both counts. Motion for change of venue was granted, and a bifurcated jury trial was held in Lowndes County on April 6, 7, 8 and 9, 1987. The jury returned a verdict of guilty as charged on both counts; after a sentencing hearing, the jury imposed the death sentence. Minnick appeals his conviction and sentance, assigning numerous errors., We affirm.

FACTS

On April 26, 1986, around 3:30 p. m., Deputy Sheriff Johnny Hopson, Clarke County, arrived at the mobile home of Donald Ellis Thomas (Ellis) in response to a call from the Jasper County Sheriff's office. He observed a puddle of blood, a hat and some mail strewn across the yard. He also observed two young girls in the presence of a Jasper County Sheriff's deputy, Marty Thomas and Desiree (B. B.) Beech. He noticed drag marks starting at the east end of the mobile home that led across the back yard of the mobile home, which he followed to the edge of a gully running behind the mobile home. In the gully he found two bodies. At this point, he secured the premises and called Chief Investigator of the Clarke County Sheriff's Department, J. C. Denham.

Upon being called to investigate, Denham proceeded to interview Marty Thomas, Ellis Thomas' younger sister, and B. B. Beach. Marty and B. B. drove over to Ellis' mobile home between 2:00 and 2:30 on April 26, to play in the gully. Marty drove her older sister's red car. As they drove up the driveway, a white man met them. Marty described him as short, skinny, with a shaved head, blue shirt, tennis shoes, two rotten front teeth, and carrying a pistol. The man told her to hand him the keys, get out of the car, and do as he said if they wanted to live. He marched them both to the back of the trailer, where they saw Ellis' truck, a big black man, and a body lying on the ground. Marty recognized the body as Lamar Lafferty. The black man carried a rifle or a shotgun. The white man took them inside the trailer through the back door, where they saw Brandon Lafferty, Lamar's two-year-old son, sitting on the couch. The white man made them lie on the floor in the den, on their stomachs, as he tied their hands and feet behind their backs with haystring. The black man came inside and began carrying guns out of the bedroom. The white man told them four or five times to tell the police that it was two black men or he'd come back and kill them. The white man then got a pitcher of tea from the refrigerator, while the black man continued to carry out guns. Then they left. Marty and B. B. cut through the haystring around their feet with their fingernails and found a knife from the kitchen to cut their hands loose. Looking out the window, they saw no one there, and saw that Ellis' truck was gone. They took Brandon, got in their car, and went to a friend's house, where Marty called the police. The Jasper County Sheriff's Office responded first; Marty told them that two black guys had tied them up. The Jasper County deputy sheriff determined that the incident occurred in Clarke

County and called the Clarke County Sheriff's Department. He then took the girls with him to the mobile home and were met by Deputy Hopson. Marty again told Hopson that two black guys had tied them up. The girls were taken to their Uncle Marlin's house where Deputy Denham came to talk to them. When Marty found out that Ellis and Lamar were dead, she told Deputy Denham the truth -- that a white man and a black man had tied them up. Upon taking Marty's and B. B.'s statements, Denham realized that the description of the two men fit the description of two escapees from Clarke County Jail, Robert Minnick and James "Monkey" Dyess, who escaped from the jail the evening before.

Denham was also able to interview Thaddis Pryor, who was turkey hunting on the morning of April 26 around the Beaver Dam community in Clarke County where his deer camp is located. On Sunday morning, April 27, having heard about the incident at the Thomas mobile home, Pryor contacted the Clarke County Sheriff's Department and related that he saw a white man and a black man on an oil lease road on foot. He approached the two men because he thought they were poachers on his camp property. He described the white man as short, skinny, pale, with a shaved head and two rotten front teeth. The black man was around six feet tall, 190 pounds, muscular build, with a short Afro. He talked to the two men for about ten minutes. Denham then met with Pryor who took him to the area where he had met Minnick and Dyess while turkey hunting. Denham was able to observe a boot print and a tennis shoe print in the area. Pryor's descriptions matched the ones given by the girls, as well as the descriptions of the two jail escapees.

The investigation pinpointed three shotguns, three rifles, a pistol, and ammunition that were taken from the trailer by Minnick and Dyess, as well as Thomas' silver Ford pickup truck. Several days after the incident, Lafferty's wallet and Thomas' checkbook were found lying along the road several miles from the Thomas trailer. Furthermore, time of the incident was estab-

lished as occurring after 1:00 p. m. on April 26. Lamar Lafferty's father ate lunch with his son and then saw Lamar and Lamar's son, Brandon, leave with Ellis in Ellis' truck around 1:00 p. m. Also, Greg Thomas, Ellis' cousin and closest neighbor, heard gunshots coming from Ellis' mobile home about 2:30 p. m. Thirty seconds later he heard another sound like a muffled shot or dud firecracker, and five minutes after that he heard two more shots which sounded like they came from a small-calibre gun. Shortly thereafter, he saw Marty and B. B. drive by in a red car.

The Medical Examiner's report indicated that Thomas suffered a close contact gunshot wound to the middle of the forehead and a second wound on the right lower back from a distance of approximately 15 feet. Lafferty suffered two gunshot wounds to the head, both close contact wounds from a small-calibre gun. The Medical Examiner's opinion was that both men were alive when their wounds were inflicted and died within a few minutes.

Denham entered the information concerning the missing guns and missing silver Ford pickup truck into the computer on the NCIC network. The truck was recovered in Florida on May 6, 1986. Apparently, the truck had been stolen from New Orleans by Paul Stanley Ward because when the truck was recovered, they found parking tickets from New Orleans under the seat. (Ward was convicted in Clarke County for possession of a stolen truck.) Denham then requested assistance from the New Orleans Police Department; however, they were not able to locate Minnick or Dyess.

On August 22, 1986, Denham received information from the San Diego Police that they had arrested Minnick. Denham flew out, arriving late August 24. He interviewed Minnick on August 25. He first advised Minnick of his rights, but Minnick refused to sign a waiver of rights form. Minnick agreed to tell him about his and Dyess' escape from Clarke County jail, but Minnick then proceeded to tell him about events after the escape. According

to Minnick as told to Deputy Denham, he and Dyess walked outside of Quitman south toward DeSoto in a wooded area. They came upon a turkey hunter and talked to him early the next morning, then continued on until they came to a clearing where the Thomas mobile home was located. They decided to go into the trailer to find guns. As they were collecting the guns, a vehicle drove up with two men and a small child in it. Dyess jumped out of the mobile home and shot one of the men in the back with a shotgun, and then shot him in the head with a pistol. Dyess handed Minnick the pistol and told him to shoot the other man. Dyess held a shotgun on Minnick until he did so. They then put the child on the sofa in the mobile home, after which the two girls drove up. They tied the girls up in the mobile home. Minnick stated that he talked Dyess out of raping or hurting the girls. Dyess dragged the bodies of the two men into the gully. They left with $131 in cash, the guns, and the silver pickup truck. They drove to New Orleans where they sold the weapons and threw the pistol in the trash. They left New Orleans on a bus to Brownsville, Texas, and then crossed the border into Mexico. Minnick and Dyess got into a fight -- Dyess beat him and tried to kill him -- so Minnick hitchhiked to California where he changed his name, procuring a birth certificate and a drivers license in the name of David Prokaska.

Minnick waived extradition and Denham brought him back to Mississippi to stand trial. Before trial commenced, the state was able to recover two of the guns stolen from the Thomas mobile home through the FBI in New Orleans.

LEGAL DISCUSSION

I. GUILT PHASE

A. Minnick's Alleged Statement to Denham Should Have Been Suppressed.

At pretrial hearing on motions, Minnick presented a written motion to suppress the statement allegedly given by him to Deputy

Denham in San Diego, California, on August 25, 1986. That motion asserted that the statements were not voluntary and that Minnick made no knowing and intelligent waiver of his right to counsel, and that he had requested assistance of counsel.

At the hearing on the motion to suppress, both Denham and Minnick testified. Also, Minnick introduced a report of an interview of Minnick by the FBI on August 23, 1986. The FBI report shows that Minnick was advised of his rights and that he refused to sign a waiver form. Minnick answered some questions, but then ceased to answer, saying, "Come back Monday when I have a lawyer." The FBI interviewers honored his request and ceased interrogation.

Deputy Denham testified that when he interviewed Minnick, he first read Minnick his Miranda rights, but Minnick refused to sign a waiver form. Denham then asked Minnick if he wanted to talk about what happened. Minnick replied, "It's been a long time since I've seen you." Then Denham asked Minnick to tell about his escape from Clarke County Jail. Minnick agreed to do that much, and then, according to Denham, just proceeded to confess to the murders. Denham left the interview and wrote up his notes concerning what Minnick said. Minnick refused to sign Denham's handwritten account of their interview. Minnick later waived extradition, and Denham brought him back to Mississippi.

Minnick also testified at the suppression hearing that he was arrested in Lemon Grove, California, by local police on August 22, beat up and carried to San Diego County Jail where he was put in a holding cell. He claimed he was not read his rights until the FBI interviewed him. He refused to talk with the FBI without an attorney.

After the FBI interview, but before Denham arrived to interview him, Minnick stated that he spoke to an attorney who told him not to speak to anyone else about any of the charges against him. When Denham arrived at the jail, the jailers told Minnick that he would have to go down and talk to Denham. Denham

read him his rights again, and Minnick refused to sign the waiver form. Minnick agreed to tell him about the escape from Clarke County Jail, and that is all he agreed to tell him. However, when questioned further about what he told Denham about the robbery and killings, Minnick refused to testify further, invoking his Fifth Amendment right against self-incrimination.

Minnick's motion to suppress the statements was overruled by the trial judge, who found that Minnick had knowingly and intelligently waived his rights. Denham could testify as to the confession, but his written notes could not be introduced into evidence. Minnick renewed his motion to suppress at trial, which was again overruled.

On appeal, Minnick argues that the confession was taken in violation of his Fifth and Sixth Amendment rights to counsel.

1. Fifth Amendment Right to Counsel

Minnick argues that, under Edwards v. Arizona, 451 U.S. 477 (1981), Denham's initiation of the interview on Monday, August 25, violated his Fifth Amendment right to counsel under Miranda v. Arizona, 384 U.S. 436 (1966), since Minnick invoked his right to counsel under Miranda during the FBI interview on August 23.

In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85. While it is true that Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not

to speak to anyone else about any charges against him.[1] In this kind of situation, the Edwards bright-line rule as to initiation does not apply. The key phrase in Edwards which applies here is "until counsel has been made available to him." Id. at 485. Since counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied. Therefore, this aspect of Minnick's argument is without merit.

2. The Sixth Amendment Right to Counsel.

Minnick argues further that his Sixth Amendment right to counsel under Mississippi law had attached by the time of the Denham interview since warrants for his arrest had issued; the state does not dispute this. See, e. g., Livingston v. State, 519 So.2d 1218, 1221 (Miss. 1988). The state, however, argues that Minnick knowingly and intelligently waived his right to

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[1] Minnick's testimony on this point was as follows:

Q: Did you ever ask to stop talking to the FBI man?

A: As I was saying, they drilled me on several questions of the incident and I told them about leaving the jail and that's all I told them. I told them I had to have a lawyer before I was able to make any statements about anything and I told them I was not signing any rights waiver or I was not signing anything because I had to have a lawyer to talk with before I could talk to any law official.

Q: What was your lawyer that you talked to--name?

A: I don't recall his name.

Q: How long did you talk to him?

A: I talked to him two different times and--it might have been three different times--but I talked to him the day he told me the next day he would get the court order. He told me that first day that he was my lawyer and that he was appointed to me and to not talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police--I advised him of the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department.

counsel when he gave the statements to Denham. In Cannaday v. State, 455 So.2d 713 (Miss. 1984), this Court stated:

> However, the Sixth Amendment right to counsel has broader ramifications [than the right to counsel under Miranda]. The accused's right to counsel, once that right has attached, is a broad guarantee that the accused "need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967).

Id. at 722. Cannaday went on to say, "once this right has attached in a criminal case interrogation may not commence without the express waiver by the defendant of the right to counsel," citing Massiah v. United States, 377 U.S. 201 (1964). Id. See also Page v. State, 495 So.2d 436, 440 (Miss. 1986). The precise question before us, then, is whether or not Minnick expressly waived his Sixth Amendment right to counsel when he spoke with Denham.

The standard for determining whether or not a defendant has waived his Sixth Amendment right to counsel was set out in Brewer v. Williams, 430 U.S. 387 (1977). The proper standard to be applied in determining the question of waiver as a matter of constitutional law is "that it [is] incumbent upon the state to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" Id. at 404. The right to counsel "does not depend upon a request by the defendant" and "courts indulge in every reasonable presumption against waiver." Id. But the Brewer opinion makes clear that a defendant can, without notice to counsel, waive his Sixth Amendment right to counsel. Id. at 405.

Applying this standard to Minnick's situation, the record supports the trial judge's finding that Minnick knew he had the right to counsel as evidenced by the fact that he had previously invoked it. There is also evidence from the record -- from Minnick's own testimony at the suppression hearing -- that he

spoke to an attorney before Denham interviewed him, and that the attorney told him not to talk to anyone.

Denham, by Minnick's own account, warned Minnick again that he need not speak to him in the absence of counsel. Minnick then testified, however, that he refused to sign a waiver of rights form, apparently believing that a waiver of rights form must be signed for any waiver to be valid. The U. S. Supreme Court has rejected this "par se rule" argument in North Carolina v. Butler, 441 U.S. 369 (1979), when it stated:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver.

Id. at 373. The Butler opinion went on to point out that while courts must presume that a defendant did not waive his rights, "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." Id.

Minnick, again by his own admission, did not tell Denham he wished to have a lawyer present before he spoke to Denham. Minnick replied to Denham's request to talk about what happened by saying, "It's been a long time since I've seen you," after which the two of them talked about various folks back in Mississippi. Denham then asked Minnick if he would at least talk about how he escaped from Clarke County Jail. By Minnick's own account, he agreed to speak with Denham about the escape -- a conscious decision to talk about the escape in the absence of counsel.[2] From Minnick's own words and actions, Minnick clearly

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2 Minnick testified at the suppression hearing on this point unequivocally:

> A: I give no direct statement of any kind concerning any murder charges or anything being on the run with Monkey Dyess, nothing that is on paper which I have read. Everything is put down, I advised this, I advised that, I advised this, I advised that. They have no signature and no coercing ears that can say that I give any sort of statement of any kind freely or voluntary to any police officer for anything. I refused and I deny anything put down on paper being that I said so and so, except and excluding the immediate escape from the county jail, which I will state I fully to the best of

relinquished his known right to counsel and responded to Denham's request.

From that point on, the evidence indicates, from Denham's testimony, that Minnick continued, freely and voluntarily, to talk about events after the jail escape. This evidence went virtually unrebutted because Minnick, when questioned about whether or not he voluntarily continued to talk about events after the jail escape, refused to testify further, invoking his Fifth Amendment right against self-incrimination.[3]

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my knowledge I did escape from the county jail. They have me dead to rights on that and there is no way around it. . . .

[3] On cross-examination on this point, Minnick responded:

Q: Sit down and I'll ask you some questions. Now, Mr. Minnick, pertaining to your rights form, you know what the Miranda Rights are, don't you?

A: That I had a right to remain silent and so on and so forth?

Q: Yes.

A: I have heard it spoke to me before on several occasions.

* * *

Q: Deputy Denham did inform you of your rights, didn't he?

A: I can't recall exactly what he said but he recited something he called rights to me and I was not able to read anything of rights waiver or any--you know--because he had no paperwork whatsoever.

Q: You stated to him you refused to sign a waiver of rights but you were willing to talk to him, didn't you?

A: Not exactly those words. I told him--well, actually it was nothing official at all and there weren't no statements official from him in any kind of way. We went through several different conversations about--first, about how everybody was back in the county jail and what everybody was doing, had he heard from Mama and had he went and talked to Mama and had he seen my brother, Tracy, and several different other questions pertaining to such things as that. And, we went off into how the escape went down at the county jail. . . .

Q: And, then you got into what happened when Lafferty and Thomas were killed, didn't you?

Under this factual scenario, it is evident that Minnick was aware of his rights, had been advised by an attorney prior to the conversation with Denham, was aware that he did not have to make any statements or answer any questions, and that he made a conscious decision to relinquish his Sixth Amendment right to counsel. The trial judge so found, and under our often-articulated scope of review, this Court will not disturb a trial judge's findings at a suppression hearing unless manifestly in error, or contrary to the overwhelming weight of the evidence. See Merrill v. State, 482 So.2d 1147, 1151 (Miss. 1986). Frost v. State, 483 So.2d 1345, 1350 (Miss. 1986); Wiley v. State, 465 So.2d 316, 320 (Miss. 1985); Neal v. State, 451 So.2d 743, 756 (Miss. 1984).

In so holding, we note that had Minnick at any point during his interview with Denham elected to have assistance of counsel before speaking further, the waiver would have immediately been dissolved. See Patterson v. Illinois, ___ U.S. ___, ___, 108 S.Ct. 2389, 2395, 101 L.Ed.2d 261, 272 (1988), n. 5. However, there is no evidence on the record that Minnick made any such request during Denham's interview. Therefore, we find no error in the lower court admitting the testimony as to Minnick's oral confession at trial. This assignment of error is without merit.

B. The Court Erred in Overruling Minnick's Motion to Prohibit "Death Qualification" of Jury Prior to Guilt Phase.

Minnick filed a motion to prohibit "death qualification" prior to the guilt phase, which was overruled at pre-trial hearing on motions. Minnick argues that the defendant is prejudiced by being required to voir dire the jury on their feelings about the death penalty because jurors who could not vote to impose the death penalty are excluded, resulting in an unfair cross section of the community. In Cole v. State, 525

A: I have no comments on that and I stand on the Fifth Amendment.

So. 2d 365, 374 (Miss. 1987), this Court rejected this argument, as has the United States Supreme Court in Lockhart v. McCree, 476 U.S. 162 (1986). This assignment, therefore, is without error.

C. The Court Erred in Improperly Instructing the Jury as to Burden of Proof.

At the end of the first day of trial, the trial judge gave the jury instructions as to their sequestration -- that they must stay together, not talk to anyone about the case, not watch tv, not read the newspapers, etc. He summed up by reminding the jury that their "decision must be based upon and controlled by the greater believable evidence in this courtroom and nowhere else." Minnick complains that the judge stated the wrong burden of proof. The distinction, however, is that the judge was not formally instructing the jury on the law, but rather on their conduct while being sequestered. Minnick makes no showing that this isolated remark prejudiced the jury. He made no contemporaneous objection to the remark, and cites no authority for his proposition. Therefore, this Court need not consider this assignment of error. May v. State, 524 So.2d 957, 967 (Miss. 1988); Ramseur v. State, 368 So.2d 842 (Miss. 1978).

D. The Court Erred in Allowing Testimony of Marlon Lafferty.

The state offered the testimony of Marlon Lafferty, Lamar's father. The first time the state advised Minnick that it planned to use Lafferty as a witness was the first day of trial, the day before Lafferty was offered as a witness, in violation of Rule 4.06, Unif.Crim.R.Cir.C.Prac. Minnick cites Box v. State, 437 So.2d 19 (Miss. 1983), for the proposition that Lafferty's testimony should have been excluded. The guidelines set out in the concurrence in Box (Robertson, J.), 437 So.2d at 22, have been applied by this Court in subsequent cases. See, e. g., Shaw v. State, 521 So.2d 1278 (Miss. 1987); Cole v. State, 525 So.2d 365, 367 (Miss. 1987); Griffin v. State, 504 So.2d 186, 195 (Miss. 1987). Under the Box procedure, defense counsel must

first make timely objection, to which the trial court should respond by giving defense counsel a reasonable opportunity to interview the witness. Box, 437 So.2d at 23. In the instant case, Minnick's counsel objected and the trial court allowed him a recess to interview Lafferty. If after the interview the defendant thinks he has been subjected to unfair surprise and that he will be prejudiced by the evidence, the defendant must move for a continuance. Id. Minnick's counsel did not move for a continuance, but merely renewed his objection, which the trial court overruled. Since the defendant did not move for a continuance, the trial court did not err in admitting the evidence. Furthermore, Minnick was not prejudiced by the testimony. Lafferty's testimony was brief and concise on one issue -- establishing that his son and Thomas were killed sometime after 1:00 p. m., since he had seen them both at lunchtime. Therefore, this assignment of error is without merit.

E. The Court Erred in Failing to Sustain the Defense Challenge for Cause for Juror No. 28.

Minnick contends that Juror No. 28, Kenny Vickery, should have been stricken for cause because Vickery stated during voir dire that in order for him not to impose the death penalty, Minnick would have to prove beyond a reasonable doubt that he should not be executed. The court overruled the challenge for cause as to Vickery; defense counsel then used his twelfth peremptory challenge to remove Vickery. However, defense counsel made no more challenges for cause and requested no more peremptory challenges.

This Court has held that "the general rule is that failure to excuse for cause is error when appellant has exhausted his peremptory challenges." Billiot v. State, 454 So.2d 445, 457 (Miss. 1984). See also Johnson v. State, 512 So.2d 1246, 1255 (Miss. 1987); Gilliard v. State, 428 So.2d 576, 580 (Miss. 1983); Rush v. State, 278 So.2d 456, 458 (Miss. 1973); Chapman v. Carlson, 240 So.2d 263, 268 (Miss. 1970). Billiot went on to

say, "Appellant did not thereafter ask for any more challenges either for cause or peremptory. Therefore, there was no reversible error." Billiot, 454 So.2d at 457. Since defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause, or ask for more peremptory challenges, this assignment of error is without merit.

F. The Court Erred in Admitting Photos of the Dead Bodies.

Before trial, Minnick made a motion to prohibit the introduction of photos of the dead bodies on the grounds of irrelevancy and prejudice. The lower court reserved ruling until trial, at which time the motion was overruled. The state argued at pre-trial hearing that it wished to use the photos to establish corpus delicti.

This Court recently, in Boyd v. State, 523 So.2d 1037 (Miss. 1988), stated, "If photographs are relevant, the mere fact that they are unpleasant or gruesome is no bar to their admission into evidence." Id. at 1040. Furthermore, Boyd went on to state that the admission of photographs is within the sound discretion of the trial judge and his decision will be upheld by this Court unless there is an abuse of discretion. Id. Under M.R.E. 403, the trial judge may exclude relevant evidence if its probative value is outweighed by its prejudicial effect. The photos admitted in the instant case were not particularly gruesome, though they were realistic; they were few in number; they tended to corroborate the investigative officers' testimony about where and how the bodies were found. They also tended to illustrate the medical examiner's testimony as to cause of death. The trial judge did not abuse his discretion in allowing the photographs into evidence. See, e. g., Williams v. State (No. DP-56, decided October 7, 1987, not yet reported); Alford v. State, 508 So.2d 1039, 1041 (Miss. 1987); Johnson v. State, 476 So.2d 1195, 1206 (Miss. 1985). Therefore, this assignment of error is without merit.

G. The Court Erred in Not Granting a Continuance Based on the Untimely Disclosure of the Blymier Evidence by the State.

Ten days before trial, the state informed Minnick's counsel that they had uncovered a material witness, James Blymier, who would testify that he bought two guns from Dyess and Minnick in New Orleans in May of 1986 (the guns were identified by serial number as two of the guns taken from the Thomas mobile home), and would identify Minnick in court. Blymier would also testify that he previously knew Dyess as one of his employees. The state became aware of this witness only the day before it notified defense counsel. Minnick filed a motion for continuance in order that defense counsel could interview Blymier. The trial judge denied the motion for continuance, but did state that as soon as Blymier was available in Mississippi, the state was to allow defense counsel an opportunity to interview him. Blymier showed up the day he was to testify, and the lower court gave defense counsel a recess during trial to interview Blymier. After the interview, Minnick made a motion to suppress the Blymier testimony, at which time Blymier testified out of the presence of the jury. Minnick again moved for a continuance. The trial judge overruled both motions, allowing Blymier to testify.

The state does not dispute that Minnick's motion for continuance was properly brought before the trial court, as set out in Gates v. State, 484 So.2d 1002, 1006 (Miss. 1986), and Miss. Code Ann. §99-15-29 (1972). Minnick alleges that the trial court abused its discretion by not allowing a continuance in order for him to interview Blymier. The granting or denial of a continuance is within the sound discretion of the trial judge. Gates, 484 So.2d at 1006; King v. State, 168 So.2d 637, 641 (Miss. 1964). The Gates opinion speaks to the issue of a continuance when a witness is unavailable. The present case is distinguishable in that Blymier was made available, albeit in New Orleans, to Minnick's counsel ten days before trial. Minnick's counsel was given as much time as he wanted to interview Blymier

before Blymier testified. The need for a continuance under these circumstances is spurious, and Minnick has not shown how he was prejudiced by not having more time than ten days to find and interview Blymier. He made no such showing in his motion for new trial, which Gates, 484 So.2d at 1006, states must be shown. See also Denton v. State, 348 So.2d 1031, 1033 (Miss. 1977) (again, dealing specifically with an unavailable witness). This Court has upheld a denial of a continuance where defense counsel has been given an opportunity to interview the witness before trial. Speagle v. State, 390 So.2d 990, 991 (Miss. 1980). Therefore, this assignment of error is without merit.

H. The Court Erred in Refusing to Exclude the Blymier Evidence.

Minnick continues his allegation that, because the state did not disclose Blymier as a witness during original discovery, his testimony should have been excluded. The state does not dispute that there was a discovery order entered pursuant to Unif.Crim.R.Cir.Ct.Prac. 4.06. See Morris v. State, 436 So.2d 1387 (Miss. 1983). The question then becomes whether or not the state violated Rule 4.06. As pointed out above, Minnick was aware of Blymier's potential testimony ten days prior to trial; Minnick received notice from the state about Blymier the day after the state uncovered him as a witness. Under these circumstances, it is hard to say that the state violated Rule 4.06. Furthermore, even if the situation could be characterized as one in which the state "failed" to produce discovery, "failure to make pretrial disclosure [does not] require per se reversal. We have recognized that non-discovered evidence may be admitted at trial if the party against whom that evidence is offered is given a reasonable opportunity to make adequate accommodation." Henry v. State, 484 So.2d 1012, 1014 (Miss. 1986). See also Foster v. State, 484 So.2d 1009 (Miss. 1986); Jones v. State, 481 So.2d 798 (Miss. 1985); Davis v. State, 472 So.2d 428 (Miss. 1985); Cabello v. State, 471 So.2d 332 (Miss. 1985). Minnick had

ten days to deal with Blymier's potential testimony. When Blymier appeared to testify, the trial judge called a recess and gave defense counsel as much time as he wanted to interview the witness. Therefore, the trial court did not abuse its discretion by allowing Blymier to testify. This assignment of error is without merit.

I. The Court Erred in Excluding the FBI-Stockwell Report.

Blymier testified that he bought the guns from Minnick and Dyess and turned them over to his store manager, Stockwell, for Stockwell to turn over to the FBI. FBI Special Agent Bryan Shields testified that he received the guns from Stockwell. Shields also stated that he made a memorandum of his interview with Stockwell which Minnick offered into evidence to impeach Blymier's testimony; the state objected on hearsay grounds. Minnick then argued that the report falls into the catchall exception, M.R.E. 804(b)(5), because Stockwell was not available to testify, even though a subpoena had been issued for him, and because the report had guaranties of trustworthiness since Stockwell made his statements to the FBI. The trial judge did not allow the report into evidence on the grounds that it was hearsay.

Stockwell's statement to the FBI as to how he came into possession of the guns did not tally with Blymier's testimony that he, Blymier, had bought the guns from Dyess and Minnick and turned them over to Stockwell. Stockwell's statement to the FBI indicates that he took the guns away from a man named Vincent Mendez, whom he saw take the guns from a black man in an alley behind Blymier's grocery store. Stockwell indicated that he brought them to the FBI when he learned that the guns had been implicated in a murder in New Orleans. Stockwell was shown a photo display of black men, including a picture of Monkey Dyess, to determine if he could positively identify the man who handed

the guns to Mendez. Stockwell could not positively identify anyone.

The problem with the FBI report is that it is hearsay within hearsay. The report itself could probably be admitted under M.R.E. 803(6), Records of a Regularly Conducted Activity. The comments to Rule 803(6) indicate that law enforcement reports can be considered under this exception. However, Stockwell's statements are not excepted by 803(6), as the comment indicates:

> However, the source of the material must be an informant with knowledge who is acting within the course of the regularly conducted activity. This is exemplified by the leading case of Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Stockwell's statements do not fit any 803 or 804 exception. The question becomes, then, whether the requirements of 804(b)(5) were met. The trial judge, while not making specific findings as to the admissibility of the evidence under a residual exception, found the Stockwell statements to be hearsay which did not fit any exception.

In Cummins v. State, 515 So.2d 869 (Miss. 1987), this Court analyzed the requirements of the residual exceptions at length. Rule 804(b)(5) requires that the proponent of the hearsay statement must give notice to the party against whom the evidence is offered. Minnick candidly admits that no notice was given until the day of trial, but that Stockwell's statements came from the state's files in the first place, so that the state could not have been totally surprised by their being offered into evidence. As Cummins points out, "[g]reat latitude is usually allowed depending on the facts and circumstances of each case in the context in which the evidence arises." Cummins, 515 So.2d at 873. The overriding concern, before a hearsay statement may be admitted under a residual exception, is that it has equivalent guarantees of trustworthiness similar to those of other excep-

tions. Minnick argues that because the statements are contained in an FBI report, they are trustworthy. The argument, however, goes to the report itself, and not to Stockwell's statements. Minnick did not offer at trial, nor here on appeal, any evidence that Stockwell's statements themselves were especially trustworthy. Considering the circumstances surrounding the retrieval of the guns, there is no outstanding reason to consider Stockwell's statements particularly trustworthy, as apparently the trial judge did not find them to be. As Cummins pointed out, "in the absence of a finding that the hearsay statements offered were sufficiently reliable, it [would be] error to admit them pursuant to the residual exceptions to the hearsay rule. Cummins, 515 So.2d at 874.

The residual exception also requires that the statement be offered as evidence of a material fact. It can be argued that it was material to Minnick's alibi defense as to whether or not he could be tied in with the guns in New Orleans; however, the next requirement, that the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable effort, weighs against admission. Minnick could have offered alibi evidence through other witnesses as to his whereabouts when these guns came into Stockwell's or Blymier's possession, and could have achieved the same result as Stockwell's statements could have achieved. Minnick made no attempt at trial to offer any such evidence. As Cummins states, "this requirement raised an issue of fact as to whether or not [the proponent] used reasonable efforts to procure live testimony. . . . Absent such a finding the evidence cannot be admitted under the residual exception to the hearsay rule." Cummins, 515 So.2d at 874.

Minnick did not successfully demonstrate at trial that Stockwell's statements met the requirements of 804(b)(5), and the trial judge correctly excluded the statements from evidence.

Minnick makes no better argument here on appeal. Therefore, this assignment of error is without merit.

J. The Court Erred in Admitting the Guns.

The two guns obtained through the FBI from Blymier/Stockwell, were admitted into evidence through the testimony of FBI agent Linda Lee, who had custody of the guns before trial. The guns had previously been identified as those belonging to Donald Ellis Thomas through serial number checks. Minnick objected to their being admitted on the grounds that chain of custody of the evidence had been broken because Stockwell was not available to testify. However, FBI Agent Bryan Shields did testify that he received the guns from Stockwell. From the time the FBI received the guns until they were admitted at trial, the chain of custody was established. In Gibson v. State, 503 So.2d 230, 234 (Miss. 1987), this Court reiterated that the test for continuous possession of evidence is whether or not there is any indication of probable tampering with or substitution of evidence. "Any question as to the chain of possession is within the sound discretion of the trial judge, and, absent abuse resulting in prejudice to the defendant, his decision will stand on appeal." Id. There is no indication that the evidence was tampered with in the present case; indeed, there is no allegation by Minnick to that effect. Furthermore, in Evans v. State, 499 So.2d 781, 783 (Miss. 1986), this Court stated:

> Physical objects which are relevant and for which the chain of custody is not broken or which are otherwise identified with certainty are admissible into evidence. [cites omitted] Matters regarding the chain of custody of evidence are largely within the discretion of the trial court, and absent an abuse of discretion, this Court will not reverse. [cites omitted] However, the confrontation clause of the Sixth Amendment is restricted to witnesses, and does not include physical evidence. United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976); G. E. G. v. State, 389 So.2d 325, 326 (Fla.Dist.Ct.App. 1980); State v. Armstrong, 363 So.2d 38, 39 (Fla.Dist.Ct.App. 1978).

The chain of custody was not broken; the guns had been otherwise identified with certainty; no confrontation clause considerations

arise. Therefore, the trial court correctly admitted the guns into evidence. This assignment of error is without merit.

K. The Court Erred in Mentioning that Defense Counsel was Appointed.

At the very beginning of the trial, the trial judge introduced Minnick's attorneys by saying:

> And, the defendant is represented by Mr. Gates from Meridian. He's associated and I have appointed an attorney from Columbus, but I'm sorry, I can't recall your name.

Minnick cites Sanders v. State, 429 So.2d 245, 252 (Miss. 1983), wherein this Court, in unequivocal terms, condemned the practice of defense counsel introducing themselves as court-appointed attorneys. However, in Compton v. State, 460 So.2d 847 (Miss. 1984), this Court, while reiterating the point that neither judges nor attorneys should introduce counsel as court-appointed, held that such a remark did not constitute reversible error in that case. Id. at 848. The remark, though not particularly commendable, does not amount to reversible error in this case. This assignment of error is without merit.

L. The Court Erred in Not Suppressing In-Court Identification by Blymier, Thomas, Beech and Pryor.

Minnick makes the argument that the pre-trial identification procedures were suggestive and that the in-court identifications were not sufficiently reliable. The "Wade trilogy" and its progeny are the guidelines this Court must follow in determining the competency of identification testimony. York v. State, 413 So.2d 1372, 1374 (Miss. 1983). York is the leading case in Mississippi on this issue and has been followed by this Court on numerous occasions. See, e. g., Davis v. State, 510 So.2d 794 (Miss. 1987); White v. State, 507 So.2d 98 (Miss. 1987); Jones v. State, 504 So.2d 1196 (Miss. 1987); Smith v. State, 492 So.2d 260 (Miss. 1986). As pointed out in York, there are two lines of analysis when considering pre-trial identifications: the Fourteenth Amendment due process analysis and the Sixth Amendment

right to counsel analysis. Minnick raises only the issue that the pre-trial identification photographic displays were suggestive. He does not specify, however, how any of the photographs were suggestive.

At the pre-trial hearing on Minnick's motion to suppress any identification from the photographs or any in-court identification, the evidence showed that Marty Thomas and Desiree Beech, who were tied up in Donald Ellis Thomas' mobile home, picked out Minnick and Dyess from a photo lineup after they had given a description of their assailant -- pale, short, skinny, with a shaved head -- to the deputy sheriff. Both testified that they could easily identify Minnick in court from their own independent knowledge of what the man who tied them up looked like, and there was no suggestion that anyone had told them who to pick from this lineup. Both girls identified photographs of Minnick at trial as well as identifying him in court.

Since there is no allegation that the photo display shown to the girls was suggestive, the trial court did not err in allowing either the evidence of their out-of-court identification of Minnick or their in-court identification of him. As stated in York, 413 So.2d at 1383, "[o]nly pretrial identifications which are suggestive, without necessity for conducting them in such manner, are proscribed."

Thaddis Pryor, who was turkey hunting and stopped and talked to a white man and a black man walking down a road in rural Clarke County on the morning of the murder, gave a description of these two men to the deputy sheriff on the day after the incident. Pryor was not shown any pictures at that time. At trial, Pryor identified photographs of Minnick and Dyess as the same two men he talked to on the morning of April 26. He also identified Minnick in court. Since Pryor did not participate in any pre-trial identification procedures, his in-court identification could not have been tainted by any suggestive pre-trial

procedures, and the trial court did not err in allowing him to testify as to Minnick's identity.

As to Blymier's identification of Minnick, there is a question of suggestiveness, since it seems from the record that the district attorney simply took a photograph of Minnick to New Orleans with him and showed it to Blymier. See Manson v. Brathwaite, 432 U.S. 98 (1977). However, there is only fleeting reference to this procedure in the record, and defense counsel did not develop it on the record or here on appeal. The trial judge heard Blymier's testimony out of the presence of the jury in a short suppression hearing during trial, and found that there would be no substantial likelihood of irreparable misidentification in allowing him to identify Minnick in court, since Blymier was able to describe Minnick accurately from seeing him in New Orleans. We cannot say that the trial judge was in error. Even an impermissibly suggestive pre-trial identification does not preclude in-court identification by an eyewitness who viewed the suspect at the procedure "unless: 1) from the totality of the circumstances surrounding it, 2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of a misidentification." York at 1383, citing Stovall v. Denno, 388 U.S. 293 (1967), and Simmons v. U.S., 390 U.S. 377 (1968). York, citing Neal v. Biggers, 409 U.S. 188 (1972), goes on to set out the factors to consider in determining whether this standard has been met:

1. Opportunity of the witness to view the accused at the time of the crime;
2. The degree of attention exhibited by the witness;
3. The accuracy of the witness's prior description of the criminal;
4. The level of certainty exhibited by the witness at the confrontation;
5. The length of time between the crime and the confrontation.

York, 413 So.2d at 1383; Neal, 409 U.S. at 199. See also Ray v. State, 503 So.2d 222, 223 (Miss. 1987). Applying these factors to Blymier's identification of Minnick in court, Blymier stated that he was able to identify Minnick in court, not because of the photograph he had seen earlier, but because he had seen Minnick in the alley by his store when Minnick and Dyess sold him the guns. He described Minnick as short, skinny, pale, and with a shaved head, a description which fit Minnick at the time he would have been in New Orleans with the guns. While there was very little testimony developed about Blymier's level of certainty of identification when he first saw the picture of Minnick and none as to the length of time between the sale of the guns to Blymier and his identifying Minnick's photograph, there was also nothing to contradict the accuracy of Blymier's identification. Under the totality of the circumstances, we cannot say that there was a very substantial likelihood of misidentification. Therefore, this assignment of error is without merit.

M. The Court Erred in Excluding Certain Testimony Pertaining to Paul Stanley Ward.

The defense called as a witness Polly Covington, the attorney for Paul Stanley Ward. She testified that Ward pled guilty and was convicted in Clarke County, Mississippi, of possession of Donald Ellis Thomas' stolen truck. Ward was found in Florida with the truck. Defense counsel then asked Mrs. Covington what conversations she had with Ward concerning how he came into possession of Thomas' truck. The state objected to Mrs. Covington being allowed to answer the question because her answer would be hearsay. The trial court sustained the objection. Proffer of the testimony was made, as follows:

> Q: What, if any, conversation did you have with Paul Stanley Ward concerning whether he stole the truck of Donald Ellis Thomas?
>
> A: I would assert the attorney/client privilege pursuant to Count IV of the Code's professional responsibility and will follow the Rules of Evidence as to anything except what

> is in the public record or I have access to in the public record.
>
> Q: What, if any, conversations did you have with Paul Stanley Ward concerning whether or not he had any involvement in the death of Lamar Lafferty and Donald Ellis Thomas?
>
> A: There again, I would assert the attorney/client privilege to any conversations I had with him. That would not be evidence from the public record.

The proffer also showed that Ward waived indictment and pled guilty to grand larceny, stating he had stolen the truck from the streets of New Orleans and had driven it to Florida.

Minnick argues that he should have been allowed to get this testimony before the jury even though Mrs. Covington asserted the attorney/client privilege. He analogizes this situation to that of Stewart v. State, 355 So.2d 94 (Miss. 1978), where this Court discussed the right of a defendant to call a witness who, it was obvious from the other evidence, would refuse to answer questions based on his Fifth Amendment right against self-incrimination. This Court held it was reversible error for the trial court to exclude that witness in that case because the witness could have answered some questions to which the Fifth Amendment privilege did not apply. This Court recognized, however, that there was a split of authority on the issue.

In United States v. Roberts, 503 F.2d 591 (9th Cir. 1975), speaking of a witness who asserted his Fifth Amendment right not to incriminate himself, the Ninth Circuit stated:

> The Sixth Amendment right to call a witness must be considered in the light of its purpose, namely to produce testimony for the defendant. [cite omitted] Calling a witness who will refuse to testify does not fulfill the purpose. . . .

Id. at 600. See also United States v. Martin, 526 F.2d 485, 487 (10th Cir. 1975); United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973).

Assuming the attorney/client privilege is analogous to the Fifth Amendment privilege against self-incrimination, the trial court did not reversibly err by not allowing Mrs. Covington to

get on the stand and assert the attorney/client privilege. Nothing could be gained by the defendant having her so testify. The attorney/client privilege aside, anything Ward would have said to her about how he came into possession of the truck would have been hearsay, anyway. For these two reasons, then, this assignment of error is without merit.

N. The Prosecutor Made Improper Closing Argument.

Minnick asserts that in closing argument at guilt phase, the state's attorney appealed to the jury's emotions with an argument calculated to inflame them. Specifically, he objects to:

(1) The state's attorney arguing that the two deceased victims "testified" through the state medical examiner.

This argument was objected to by defense counsel and overruled.

(2) The state's argument that the jury should do justice for the people of Clarke County.

No objection was made at trial to this line of argument.

(3) The prosecution's rebuttal argument stated he was mad that defense counsel had the audacity to suggest the possibility that the eyewitness testimony of the two little girls could be unreliable.

No objection was made to this argument at trial.

(4) The DA's characterization of Minnick's confession statement that Dyess forced him to shoot one of the victims as an excuse, and that Minnick was the only one identified with the pistol.

This argument was objected to at trial, which the trial court sustained to some extent by telling the jury that it was to find facts from the evidence, and not based on what counsel says. The DA continued this line of argument, to which defense counsel again objected; the objection was sustained.

(5) The DA, in rebuttal, argued that the people are the law and the people must enforce the law.

Defense counsel objected, which objection was sustained; defense counsel then moved for mistrial, which was denied.

The state first argues that as to those statements made by the prosecutor to which no contemporaneous objection was made the

error, if any, is waived, citing Cole v. State, 525 So.2d 365 (Miss. 1987), wherein this Court stated: "If no contemporaneous objection is made, the error, if any, is waived. This rule's applicability is not diminished in a capital case." Id. at 369. See cases cited therein. This procedural bar would apply to allegations (2) and (3) above. The state argues that the other comments must be taken as a whole, and as such, they fall into the wide latitude permitted in final argument, citing Griffin v. State, 504 So.2d 186 (Miss. 1987). In Griffin this Court stated: "Both sides are afforded wide latitude in their final arguments to the jury so long as they do not argue some impermissible factor." Id. at 194. See also Neal v. State, 451 So.2d 743, 762 (Miss. 1984). Two of the prosecutor's statements which could be characterized as impermissible, that Minnick was the only one identified with the pistol, which the evidence did not concretely support, and that the people are the law and the people must enforce the law, were objected to and the objections sustained by the trial court. The trial court additionally instructed the jury that it must find the facts, and not rely on what the prosecutor says the facts are. These two objectionable statements were cured by the trial judge.

Taken as a whole, all of these statements fall into the permissible latitude afforded attorneys in closing argument. As this Court stated in Johnson v. State, 416 So.2d 383, 391 (Miss. 1982), quoting Nelms and Blum Company v. Fink, 159 Miss. 372, 382, 131 So.2d 817, 820 (1930):

> Counsel was not required to be logical in argument; he is not required to draw sound conclusions, or to have a perfect argument measured by logical and rhetorical rules; his function is to draw conclusions and inferences from evidence on behalf of his client in whatever he deems proper, so long as he does not become abusive and go outside the confines of the record.

Minnick was not impermissibly prejudiced by the prosecutor's remarks and, therefore, this assignment of error is without merit.

II. PENALTY PHASE

A. The Court Erred in Overruling Minnick's Motion for Supplemental Voir Dire of the Jury at the Penalty Phase.

Pre-trial, Minnick filed a motion for separate voir dire of the jury at penalty phase, which was overruled. This motion was filed in conjunction with his motion that the jurors should not be "death qualified" as discussed. On appeal, Minnick actually argues that a separate jury should have been empaneled to hear the evidence at penalty phase.

This argument has been rejected by this Court on numerous occasions. See, e. g., Johnson v. State, 476 So.2d 1195, 1202 (Miss. 1985); Jones v. State, 461 So.2d 686, 692 (Miss. 1984); Billiot v. State, 454 So.2d 445, 455 (Miss. 1984); Culberson v. State, 379 So.2d 499, 508 (Miss. 1980); Jackson v. State, 337 So.2d 1242, 1256 (Miss. 1976). In Jackson this Court indicated that the preferred practice was to keep the same jury for both phases of the trial if practical and barring any unforeseen circumstances. Jackson, 337 So.2d at 1256. In Johnson and Billiot, this Court pointed out that such practice was provided for in Miss. Code Ann. §99-19-101 (Cumm. Supp. 1987) and that such practice is constitutional. Billiot, 454 So.2d at 456; Johnson, 476 So.2d at 1202. Therefore, this assignment of error is without merit.

B. The Court Erred in Excluding the FBI-Stockwell Report at Sentencing Phase.

This assignment of error as to guilt phase was discussed above. Minnick puts forth no new arguments as to the exclusion of the report at penalty phase. Therefore, the previous discussion applies here, as well. This assignment of error is without merit.

C. The Court Erred in Failing to Grant a Cautionary Instruction as Requested by Defense Counsel.

At the end of the guilt phase, defense counsel asked for a cautionary instruction to the effect that on three occasions

there were serious emotional outbursts by members of the victims' families. Minnick wanted the jury instructed to discount any emotional outbursts during deliberation. The instruction was denied. This argument is tied to Minnick's earlier argument that a new jury should have been empaneled before sentencing phase because during guilt phase, several members of the victims' families testified. Minnick characterizes the testimony and the emotional outbursts as tantamount to victim impact evidence which was prohibited in Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Alternatively, he argues that under Fuselier v. State, 468 So.2d 45 (Miss. 1985), the emotional outbursts prejudiced Minnick to the point that the jury returned the death penalty based on emotion and sympathy for the victims' families, amounting to an arbitrary imposition of the death penalty.

It is true that several members of the victims' families testified; however, they all testified as to facts relevant and pertinent to the issues in the case. None of these witnesses testified about any emotional impact the death of their loved ones had on them.

Clearly, Booth does not apply to this kind of testimony. The Booth decision dealt with a Maryland statutory provision that a prepared Victim Impact Statement (VIS) outlining the emotional impact on the family and outlining the family's characterization of the crime, should be introduced into evidence at penalty phase. Such evidence was held by the Booth court to violate the Eighth Amendment. Absolutely nothing of the kind of evidence prohibited by Booth was before the jury in the present case.

As to the analysis under Fuselier, there was no situation in the present case as there was in Fuselier, where a member of the victim's family sat with the prosecutor inside the rail, facing the jury, consulting with the prosecutor, and displaying emotion. There is no specific indication in the present record when these

alleged emotional outbursts occurred, or that they at any point interrupted the proceedings.

Based on the record, there was no emotionalism displayed that rises to the level as discussed in Fuselier. The trial judge apparently did not believe there was a serious problem, and from the record there is no basis to say that he was in error by denying the request for a cautionary instruction. Furthermore, the jury was adequately instructed on numerous occasions that it must determine sentence based only on the law and the evidence. This assignment of error is without merit.

D. The Court Erred in Refusing Instruction D-3 -- Sentencing Phase.

Minnick requested the following jury instruction, which was refused:

> The Court instructs the jury that if you have any whimsical doubt then that is a mitigating circumstance.

In refusing the instruction, the trial court told defense counsel that he could argue whimsical or residual doubt to the jury if he chose, which defense counsel did. Minnick cites Smith v. Mainwright, 741 F.2d 1248 (5th Cir. 1984), as support for his proposition. While that case acknowledges that a "whimsical doubt" might inure to the benefit of a defendant, the opinion does not say that the jury needs to be instructed on whimsical doubt as a mitigating factor. In fact, this discussion was in the context of the court considering an ineffective assistance of counsel claim and, tangentially, the ramifications of a single jury sitting for both phases of a capital trial. In a later Fifth Circuit case, Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), the Fifth Circuit again considered whimsical doubt in terms of such being a beneficial by-product of the same jury sitting for both phases of the trial. Id. at 1251. That discussion was in the context of what limitations may be imposed on defense counsel's argument so as not to impair the jury's

consideration of residual doubt. No discussion of a jury instruction appears in this opinion.

In the recent case of Franklin v. Lynaugh, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the United States Supreme Court addressed the issue of whether or not the Eighth Amendment requires that the jury be instructed as to residual doubt as a mitigating factor. In a plurality opinion (the two concurring justices did not disagree on this issue, but voiced some concern over Texas's sentencing procedure), the Supreme Court pointed out that none of its previous opinions held that there is a constitutional right to such an instruction in mitigation, pointing out that residual doubt does not go to the issue of defendant's character, record, or circumstances of the offense, but only to doubt about defendant's guilt which is not, in the strictest sense, a mitigating factor. Franklin, ___ U.S. at ___, 108 S.Ct. at 2327, 101 L.Ed.2d at 166. The opinion focuses on the idea that where a defendant argues residual doubt to the jury, which a defendant is free to do to a relevant extent, the defendant's right to have a jury consider residual doubt is not impaired by the trial court rejecting an instruction on residual doubt. Franklin, ___ U.S. at ___, 108 S.Ct. at 2328, 101 L.Ed.2d at 167.

Since Minnick's counsel was able to argue whimsical doubt to the jury, the jury's consideration of whimsical doubt was not impaired by the trial court's denial of a jury instruction on whimsical doubt. Therefore, this assignment of error is without merit.

E. The Court Erred in Excluding the Prison Record of Paul Stanley Ward at Sentencing Phase.

Defense counsel offered the prison record of Ward at sentencing phase because the records reflect that Ward escaped from the custody of the Mississippi Department of Corrections on November 7, 1986. Apparently, Minnick's argument is that Ward's flight from custody is a fact from which guilt can be inferred, citing Fuselier v. State, 468 So.2d 45, 57 (Miss. 1985). It is

not clear from either the record or from appellant's brief what crime Ward was supposedly fleeing when he escaped from prison. In this regard, Minnick's reliance on Fusalier is totally misplaced; the flight instruction in Fusalier was held to be improperly given because flight from the murder scene could have been probative of guilt of two to crimes -- murder and escaping from prison. Id. at 57.

The trial court correctly excluded Ward's prison records on the basis that they were totally irrelevant to any mitigating factor. Nevertheless, Minnick further argues that the Ward prison records could have gone to whimsical doubt. Again, as discussed above, the trial judge can exclude, as irrelevant, mitigation evidence not bearing on defendant's character, record or circumstances of the crime. Therefore, this assignment of error is without merit.

F. The Court Erred in Excluding Evidence Pertaining to James Dyess at Penalty Phase.

As with the Ward prison record, Minnick also offered in mitigation the prison record of James "Monkey" Dyess to show that Minnick was under the domination of Dyess. The trial judge found the prisnn records to be irrelevant and not germane to the issue of Dyess' domination of Minnick. While it is true that the defendant has a right to place before the jury any mitigating evidence as to the circumstances of the crime, as well as his character, see, e. g., McCleskey v. Kemp, 481 U.S. ___, ___, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262, 286 (1987), Skipper v. South Carolina, 476 U.S. 1, 8 (1986), Cole v. State, 525 So.2d 365, 371 (Miss. 1987), it is clear that the evidence must be relevant to one or more of those factors. While evidence that Minnick's character was such that he could be easily dominated by a stronger personality might be relevant, or evidence that in the circumstances of this offense Minnick was dominated by someone else, there is no indication or reason to believe that the prison records of James Dyess would demonstrate either of those factors.

Furthermore, the focus of mitigation evidence is that of the defendant's character, record, etc., so that individualized consideration of sentencing may be engaged in by the jury. See McCleskey, 481 U.S. at ___, 107 S.Ct. at 1773, 95 L.Ed.2d at 262. Dyess' prison records do nothing to focus on Minnick's character or the circumstances of this crime. Therefore, the trial judge correctly excluded the Dyess prison records from evidence at sentencing phase. This assignment of error is without merit.

G. The Court Erred in Admitting Records of Conviction.

Minnick's records of prior convictions from both California and Mississippi were introduced at penalty phase over objection by defense counsel on the basis of lack of foundation by proper custodian. Minnick admits, however, that the records were certified. The California records are a summary of the court records certified by the trial judge where Minnick was committed and sentenced for assault with a deadly weapon. This Court has approved admitting these kinds of records as proof of a prior conviction. See DeRussi v. State, 453 So.2d 1030, 1031 (Miss. 1984); Lovelace v. State, 410 So.2d 876, 878 (Miss. 1982). The Mississippi record was a certified copy of the judgment of conviction where Minnick plead guilty to a robbery charge and was sentenced to eight years (the sentence Minnick was serving when he escaped from the Clarke County Jail). This Court has regularly upheld proof of prior convictions made by certified copies of judgments of conviction. See Debussi, 453 So.2d at 1031 and cases cited therein.

Minnick raises on appeal a different objection to these records -- that there is not proof that the Robert S. Minnick on the records was the same Robert S. Minnick on trial. Aside from the problem that Minnick is barred from raising this issue on different grounds from his objection below, Livingston v. State, 525 So.2d 1300, 1303 (Miss. 1988), the state elicited testimony from Deputy Sheriff Denham that he had personally retrieved these

records of prior conviction for the district attorney and knew that Robert S. Minnick was one and the same at trial as in those records. Denham also supervised Clarke County Jail and knew Minnick to be the same one sentenced for robbery as represented by the Mississippi records. This testimony went unrebutted at trial. Therefore, this assignment of error is without merit.

H. Aggravating Circumstances.

1. Stacking.

Minnick filed a motion to prohibit the state from using as aggravating factors that the crime was committed during the course of a robbery and that the crime was committed for pecuniary gain. The argument is the familiar "stacking" argument that the state can elevate murder to felony murder and then, using the same circumstances, can elevate the crime to capital murder with two aggravating circumstances. As pointed out in Lockett v. State, 517 So.2d 1317, 1337 (Miss. 1987), this Court has consistently rejected this argument. See also Jones v. State, 517 So.2d 1295, 1300 (Miss. 1987); Wiley v. State, 484 So.2d 339, 351 (Miss. 1986). The United States Supreme Court, in Lowenfeld v. Phelps, 484 U.S. ___, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), held that the fact that the sole aggravating circumstance found by the jury in its penalty decision was identical to an element of the underlying offense did not violate the Eighth Amendment. Lowenfeld, 484 U.S. at ____, 108 S.Ct. at 555, 98 L.Ed.2d at 583. This assignment of error is without merit.

2. "Especially Heinous, Atrocious or Cruel."

Two identical jury instructions, SS-5 and SS-6, were submitted, one for the killing of Thomas and one for the killing of Lafferty, in which six aggravating circumstances were outlined which the jury could consider. One of the aggravating circumstances was the "especially heinous, atrocious or cruel" aggravating circumstances set out in Miss. Code Ann. §99-19-101 (Cumm. Supp. 1987). Minnick argues that the jury was not

properly instructed as to this aggravating circumstance so that it narrows the class of convicted murderers who may receive the death penalty -- in other words, the aggravating circumstance is unconstitutionally vague. He directs this Court's attention to the recent United States Supreme Court case of Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), as controlling this issue. In Maynard the United States Supreme Court held the "especially heinous, atrocious or cruel" aggravating factor to be unconstitutionally vague and violative of the Eighth Amendment where the jury was not given a limiting instruction. However, the sentencing jury in the present case was given a limiting instruction as to the meaning of "especially heinous, atrocious or cruel." Therefore, in this case, the "especially heinous, atrocious or cruel" aggravating circumstance, with the limiting instruction, was not unconstitutionally vague, as contemplated by the Maynard decision. This assignment of error is without merit.

I. The Court Erred in Instructing the Jury to Make a Finding as to Whether or Not Minnick Intended that a Killing Take Place and as to Whether or Not Minnick Contemplated that Lethal Force Be Used.

Minnick argues that the evidence was insufficient to support the two findings that the jury made that Minnick intended that a killing take place or that he intended that lethal force be used. The jury was instructed, as to each victim, that it should make findings as set out in Miss. Code Ann. §99-19-101(7) (Cum. Supp. 1987) as to whether or not:

> (a) the defendant actually killed, (b) the defendant attempted to kill, (c) the defendant intended that a killing take place, (d) the defendant contemplated that lethal force be used.

Minnick first argues under the Weatherspy Rule, Weatherspy v. State, 165 Miss. 207, 147 So. 481 (1933), which states that "where the defendant is the only eyewitness to a homicide, his version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible

witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." Id. at 209, 147 So. at 482. See also Jordan v. State, 513 So.2d 574, 579 (Miss. 1987); Alford v. State, 508 So.2d 1039, 1041 (Miss. 1987); Watts v. State, 503 So.2d 803, 808 (Miss. 1987). Minnick contends that the only evidence of the actual killings came from his alleged confession, and that his version of what happened must be accepted as true. Minnick's reliance on the Weatherspy Rule is totally misplaced in the context of the jury's findings under our death penalty sentencing statute. The Weatherspy Rule is applicable only in the context of whether or not the defendant killed with malice or intent; in other words, is there sufficient evidence to prove that defendant killed with malice or intent where his version of the incident as the only eyewitness, says otherwise. See Watts, 503 So.2d at 808. Where the trial on a capital offense has reached the sentencing phase, defendant's guilt has been found and Weatherspy considerations are no longer applicable.

Minnick further argues that under Enmund v. Florida, 458 U.S. 78 (1982) (which is still controlling in Mississippi by virtue of the required statutory findings the jury must make, rather than the recent standard of "culpable mental state of reckless disregard for human life" set out in Tison v Arizona, 481 U.S. ___, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)), there is insufficient evidence to support these two jury findings. This Court faced a similar argument in Leatherwood v. State, 435 So.2d 645, 655 (Miss. 1983), where the defendant argued under Enmund that the death penalty could not be imposed upon a "non-trigger man" unless there is proof that the defendant killed, attempted to kill, or intended to kill the victim. Id. at 656. This Court found that the Leatherwood situation did not fall within Enmund's holding -- Enmund did not participate in the actual robbery nor was he present when the murder was committed, while Leatherwood participated in the robbery and was present when the murder was committed. Id. The present case likewise does not fall within

Enmund's holding, since Minnick actually participated in the robbery and was present in some role while both murders were committed, such that the jury could reasonably find that Minnick intended the killings and intended that lethal force be used.

This assignment of error is without merit.

J. The Prosecutor Made Improper Closing Argument.

This argument is a continuation of the argument Minnick made under the guilt phase. Specifically, Minnick objects to the following comments made by the prosecutor at closing argument of the penalty phase:

(1) That the death penalty preserves life because it deters crime.

No objection was made to this comment.

(2) That robbery is proved.

Objection was made and overruled.

(3) That the defendant wants mercy. What mercy did these two men get?

This comment was not objected to.

(4) That any other verdict would be a charade to justice.

Objection was made and overruled.

(5) That Minnick has had three fair trials (for two murders and robbery).

No objection was made to this comment.

(6) That the only way to control Robert S. Minnick is to sentence him to death.

No objection was made to this comment.

(7) That Minnick went to New Orleans to sell the guns.

No objection was made to this comment.

(8) Where was the leniency for Thomas Lafferty and their families? If you have a tear to shed, shed it for these two individuals.

No objection was made to this comment.

The state, of course, argues that as to those comments for which no objection was made, procedural bar applies. See Cole v. State, 525 So.2d 365, 369 (Miss. 1987). Procedural bar would

apply to comments (1), (3), (5), (6), (7) and (8). Comment (2) was a statement summarizing the evidence -- that there is evidence to prove robbery, which the jury already decided since it returned a guilty verdict. Comment (4) could be characterized as a rhetorical statement to persuade the jury to return a death penalty.

Aside from the procedural bar, the comments taken as a whole do not argue an impermissible factor or go outside the record. They seem to fall within the wide latitude afforded counsel in closing argument, as discussed earlier in this opinion. Therefore, this assignment of error is without merit.

K. Ineffective Assistance of Counsel.

Minnick alleges that he was denied his Sixth Amendment right to counsel at penalty phase because his attorney committed unprofessional errors sufficient to effect the outcome of the penalty phase. It is interesting to note that Minnick is represented on appeal by the same attorney who represented him at trial (in essence, the attorney is claiming his own ineffectiveness). In any event, Minnick alleges specifically that

(1) No mercy instruction was tendered.

(2) No objections were made by defense counsel to improper argument by the district attorney.

(3) Defense counsel failed to object to two aggravating circumstances which did not fit Minnick's case.

Minnick does not specifically allege whether or not these omissions would have changed the outcome of the sentencing phase.

The applicable test is Strickland v. Washington, 466 U.S. 668 (1984), which this Court has applied on numerous occasions. See, e.g., Byrd v. State, 522 So.2d 756, 760 (Miss. 1988); Reynolds v. State, 521 So.2d 914, 918 (Miss. 1988); Carney v. State, 525 So.2d 776, 780 (Miss. 1988); Caballo v. State, 524 So.2d 313, 315 (Miss. 1988); Wiley v. State, 517 So.2d 1373, 1382 (Miss. 1987); Merritt v. State, 517 So.2d 517, 520 (Miss.

1987); Faraga v. State, 514 So.2d 295, 308 (Miss. 1987). The Strickland test is two-pronged: first, the defendant must show that counsel's performance was deficient. As stated in Faraga, 514 So.2d at 306, "counsel's conduct, viewed as of the time of the actions taken, must have fallen outside of a wide range of reasonable professional assistance." On the record as a whole, Minnick's counsel was diligent, tenacious, persistent, and conscientious in his defense of Minnick. These three omissions cannot fairly be characterized as incompetence. At trial, it should be remembered that Minnick's confession had been admitted into evidence. By sentencing phase, the jury had already returned a verdict of guilty. Defense counsel effectively argued mercy to the jury in his closing argument; he also effectively argued that the evidence did not fit any of the aggravating circumstances. His closing argument took advantage of the wide latitude afforded attorneys in closing argument such as to counter-balance the wide latitude taken by the state in closing argument. In essence, these three omissions were counter-balanced by the attorney's closing argument such that the jury's consideration of any of these three ideas was not impaired.

The second prong of the Strickland test is that a defendant must show that the deficient performance was prejudicial. This prong requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. There is nothing in the record to suggest that these three omissions prejudiced Minnick to the point that there is a reasonable probability that the outcome would have been different. Minnick has not met either prong of the Strickland test and, therefore, this assignment of error is without merit.

CONCLUSION

Having reviewed the record as submitted from the Circuit Court of Lowndes County, Mississippi, we find no reversible error therein.

Pursuant to Miss. Code Ann. §99-19-105(3)(a), (b), (c) and (5) (Cum. Supp. 1987), and the decisions of both this Court and the Federal courts on the imposition of the death penalty, we have reviewed the record in this case and compared it to the death sentences imposed in the cases decided by this Court since Jackson v. State, 337 So.2d 1242 (Miss. 1976), which cases are set forth in Appendix A. Having engaged in this comparison, we now hold that the punishment of death in this case is not too great when the aggravating and mitigating circumstances are weighed against each other, and we are satisfied that the death penalty will not be wantonly or freakishly imposed here.

We conclude that the death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supports the jury's finding of statutory aggravating circumstances under §99-19-101 and that the sentence of death is not excessive or disproportionate to the penalty imposed in other cases, considering the defendant, a jailed habitual offender who escaped from jail, the crime, a double homicide, and the manner in which the crime was committed, in the course of a robbery to acquire money, a vehicle and guns, along with the kidnapping and tying up of two young girls; that the death penalty imposed upon Minnick is consistent with similar cases; and that the sentencing phase of the trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.

We affirm both the guilt phase and the sentencing phase of this trial and, therefore, affirm the conviction of Robert S. Minnick on charges of capitol murder and the imposition of the death penalty. The date of Wednesday, January 18, 1989, is set

as the date of execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED.

ROY NOBLE LEE, C.J., HAWKINS, P.J., PRATHER, SULLIVAN, ANDERSON, GRIFFIN AND ZUCCARO, JJ., CONCUR. ROBERTSON, J., DISSENTING WITH SEPARATE WRITTEN OPINION.

APPENDIX "A"

DEATH CASES AFFIRMED BY THIS COURT:

Nixon, Sr. v. State, No. DP-65 (Miss. November 25, 1987)

Williams v. State, No. DP-56 (Miss. October 7, 1987)

Lockett v. State, 517 So.2d 1317 (Miss. 1987)

Lockett v. State, 517 So.2d 1346 (Miss. 1987)

Faraga v. State, 514 So.2d 295 (Miss. 1987)

Cole v. State, 525 So.2d 365 (Miss. 1987)

Jones v. State, 517 So.2d 1295 (Miss. 1987)

Miley v. State, 484 So.2d 339 (Miss. 1986)

Johnson v. State, 477 So.2d 196 (Miss. 1985)

Gray v. State, 472 So.2d 409 (Miss. 1985)

Caballo v. State, 471 So.2d 332 (Miss. 1985)

Jordan v. State, 484 So.2d 475 (Miss. 1985)

Wilcher v. State, 455 So.2d 727 (Miss. 1984)

Billiot v. State, 454 So.2d 445 (Miss. 1984)

Stringer v. State, 454 So.2d 468 (Miss. 1984)

Dufour v. State, 453 So.2d 337 (Miss. 1984)

Neal v. State, 451 So.2d 743 (Miss. 1984)

Booker v. State, 449 So.2d 209 (Miss. 1984)

Wilcher v. State, 448 So.2d 927 (Miss. 1984)

Caldwell v. State, 443 So.2d 806 (Miss. 1983)

Irving v. State, 441 So.2d 846 (Miss. 1983)

Tokman v. State, 435 So.2d 664 (Miss. 1983)

Leatherwood v. State, 435 So.2d 645 (Miss. 1983)

Hill v. State, 432 So.2d 427 (Miss. 1983)

Pruett v. State, 431 So.2d 1101 (Miss. 1983)

Gilliard v. State, 428 So.2d 576 (Miss. 1983)

Evans v. State, 422 So.2d 737 (Miss. 1982)

King v. State, 421 So.2d 1009 (Miss. 1982)

Wheat v. State, 420 So.2d 229 (Miss. 1982)

Smith v. State, 419 So.2d 563 (Miss. 1982)

Johnson v. State, 416 So.2d 383 (Miss. 1982)

DEATH CASES AFFIRMED BY THIS COURT (Continued):

Edwards v. State, 413 So.2d 1007 (Miss. 1982)

Bullock v. State, 391 So.2d 601 (Miss. 1980)

Reddix v. State, 381 So.2d 999 (Miss. 1980)

Jones v. State, 381 So.2d 983 (Miss. 1980)

Culberson v. State, 379 So.2d 499 (Miss. 1979)

Gray v. State, 375 So.2d 994 (Miss. 1979)

Jordan v. State, 365 So.2d 1198 (Miss. 1978)

Voyles v. State, 362 So.2d 1236 (Miss. 1978)

Irving v. State, 361 So.2d 1360 (Miss. 1978)

Washington v. State, 361 So.2d 61 (Miss. 1978)

Bell v. State, 360 So.2d 1206 (Miss. 1978)

DEATH CASES REVERSED AS TO GUILT PHASE AND SENTENCE PHASE:

West v. State, 519 So.2d 418 (Miss. 1988)

Houston v. State, No. DP-78 (Miss. September 7, 1988)

Davis v. State, 512 So.2d 1291 (Miss. 1987)

Williamson v. State, DP-63 (Miss. August 12, 1987)

Smith v. State, 499 So.2d 750 (Miss. 1987)

West v. State, 485 So.2d 681 (Miss. 1985)

Fisher v. State, 481 So.2d 203 (Miss. 1985)

Johnson v. State, 476 So.2d 1185 (Miss. 1985)

Fuselier v. State, 468 So.2d 45 (Miss. 1985)

West v. State, 463 So.2d 1048 (Miss. 1985)

Jones v. State, 461 So.2d 686 (Miss. 1984)

Moffett v. State, 456 So.2d 714 (Miss. 1984)

Lanier v. State, 450 So.2d 69 (Miss. 1984)

Laney v. State, 421 So.2d 1216 (Miss. 1982)

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

White v. State, No. DP-66 (Miss. August 3, 1988)

Edwards v. State, 441 So.2d 84 (Miss. 1983)

Dycus v. State, 440 So.2d 246 (Miss. 1983)

Coleman v. State, 378 So.2d 640 (Miss. 1979)

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Stringer v. State, 500 So.2d 928 (Miss. 1986)

Pinkton v. State, 481 So.2d 306 (Miss. 1985)

Mhoon v. State, 464 So.2d 77 (Miss. 1985)

Cannaday v. State, 455 So.2d 713 (Miss. 1984)

Wiley v. State, 449 So.2d 756 (Miss. 1984)

Williams v. State, 445 So.2d 798 (Miss. 1984)

DECIDED DEC 14 1988

IN THE SUPREME COURT OF MISSISSIPPI

NO. DP-79

ROBERT S. MINNICK

V.

STATE OF MISSISSIPPI

ROBERTSON, JUSTICE, DISSENTING:

I.

We have a rule that seems to work well in civil cases. A lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present. At the very least he must give notice of his intentions to or obtain consent of opposing counsel. This rule is undergirded by an ethical principle.[1] All accept that a lawyer who approaches a represented third party without going through counsel should be severely sanctioned. And this is so though the lawyer uses a lay representative or paralegal to do his dirty work.[2]

Think what we would do in a personal injury case. The injured party is represented and has been engaged in settlement negotiations with the prospective defendant and his

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[1]See Rule 4.2 of Mississippi Rules of Professional Conduct, effective July 1, 1987, entitled "Communication with person represented by counsel."

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

[2]See Rule 5.3, Miss.R.Prof.Conduct.

lawyer. Unbeknownst to plaintiff's lawyer, defense counsel's paralegal investigator approaches plaintiff and emerges with a settlement agreement for a sum substantially less than counsel had been demanding. Or, suppose the investigator obtained a(n oral) statement that compromises plaintiff's case.[3] We know well what would happen, the only point of mystery being whether defense counsel would be shot or flogged.

We regard this rule a fair one. Its genesis lies in our concern with fairness. That the third party has a lawyer is taken as an expression of his wish to be dealt with only through counsel. There is substantial probability of the party being overreached when his lawyer is not there. The integrity of the lawyer-client relationship is at stake.

I know of no basis for assuming that a prosecuting attorney is exempt from these rules. Indeed, the district attorney has a special responsibility for assuring that the accused has counsel and is not taken unfair advantage of.[4] We have recognized in a variety of contexts that the knowledge and conduct of law enforcement authorities are imputed to the prosecuting attorney as representative of the state. See, e.g., White v. State, 498 So.2d 368, 370 (Miss.1986); Foster v. State, 484 So.2d 1009, 1011 (Miss.1986); Fuselier v. State, 468 So.2d 45, 56 (Miss.1985). By analogy, Deputy Sheriff Denham was the agent and alter ego of the district attorney when he went to San Diego to interview Minnick. See People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 898 (1976).

If I understand the facts correctly, Minnick was taken into custody and placed in jail in San Diego, California, on

[3]See Brunke v. Arnold, 44 Ill.2d 132, 254 N.E.2d 453, 455 (1969); see also Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc., 440 F.2d 1216, 1219 (7th Cir.1971).

[4]See Rule 3.8, Miss.R.Prof.Conduct.

August 22, 1986. He was interviewed by an FBI agent on August 23. At that time, according to the majority, "Minnick answered some questions, but then ceased to answer, saying, "Come back Monday when I have a lawyer." After the FBI interview but before Deputy Denham arrived, a lawyer was furnished to Minnick, apparently a San Diego public defender, who, according to the majority, "told him not to speak to anyone else about any of the charges against him."[5] Under these facts we need not engage in the familiar metaphysics of attachment of the right to counsel. The right had attached. See Nicholson v. State, 523 So.2d 68, 76-77 (Miss.1988); May v. State, 524 So.2d 957, 967 (Miss.1988); Jimpson v. State, 532 So.2d 985, 988-89 (Miss.1988); see also Page v. State, 495 So.2d 436, 439-42 (Miss.1986); Cannaday v. State, 455 So.2d 713, 722 (Miss.1984). Minnick had "invoked" his right to counsel and had been furnished counsel before Deputy Sheriff Denham arrived at his San Diego jail cell.[6] Knowledge of these facts was imputed to Denham. Arizona v. Roberson, 486 U.S. ____, 108 S.Ct. 704, 100 L.Ed.2d 704, 717 (1988). Whatever protections the right affords were Minnick's to enjoy. Page v. State, 495 So.2d 436, 439-42 (Miss.1986).

The facts before us, imagine this scenario. The day before trial the district attorney, or some representative of

[5]This fact is not in the record. It was conceded, however, by Minnick's appellate counsel at oral argument.

[6]In a very real sense this case begins the "day after" Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Today's concern is the case scenario after the Edwards accused has established an attorney-client relationship with a lawyer albeit in this instance an out of state public defender.

the prosecution force, e.g., a deputy sheriff, visits Minnick in his jail cell. This is done without so much as a "By your leave" or "Kiss my foot" to Minnick's lawyer. The district attorney says, "Mr. Minnick, your trial begins tomorrow and there are a few points I want to clear up before the trial begins." Assume then that the district attorney (or his representative) reads Minnick the standard Miranda warnings and without obtaining any express acknowledgment or waiver, written or oral, proceeds to ask Minnick questions, to which Minnick responds. Assume further that Minnick is not told "Now, Mr. Minnick, we know that Mr. Gates is your lawyer and perhaps you ought to talk to him before we interview you;" all that is said to Minnick is the bare minimum required by Miranda. I cannot imagine that we would allow use at trial of the fruits of such a pre-trial interview. See People v. Hobson, 39 N.Y.2d 479, 348 N.Ed.2d 894, 898-99 (1976). What I can imagine is the language with which this Court would unanimously condemn such a shoddy practice.

How i that different from what we have here? Minnick's entitlement to the protections of counsel were not lesser on August 25, 1986, than on the day before trial. I know of no principled basis for saying that the shield of counsel and Minnick's right thereto was less potent on August 25 than on the day before trial.

The implicit premise of the majority opinion is that the accused's right to counsel and privilege against self-incrimination are in the jailhouse like a child at birth, alive and well but rather incompetent and defenseless, growing into a mature adult-like right only come trial time. But what in logic or law or life suggests the right to counsel ought be so regarded? The apt analogy is the full grown Minerva who sprang from the head of Zeus. The right to counsel is as full

grown at the moment of attachment as it will ever be, as available to the accused then as ever, and at each point thereafter where there exists a possibility for irremedial prejudice to the accused, for once the confession is obtained, the prosecution is generally a downhill proposition. There is no more critical stage than where a confession is sought.

II.

Courts ought enforce those rules emanating from the best reading that may be given the principles that fit and justify the positive law of the state. That law ought be seen as an organic whole. The positive law possessing power this day ranges from the privilege against self-incrimination and right to counsel embedded in Article 3, Section 26 of the Mississippi Constitution of 1890, across statute and case law to Rules 1.02-1.05 of our Uniform Criminal Rules of Circuit Court Practice.

The principles which fit and provide the best, albeit far from perfect, justification for our positive law today include at least these four: (1) at each encounter following custody, the individual should be treated fairly;[7] (2) because of the realities of the criminal justice system, the accused is ordinarily weaker than the prosecution and needs special protection to assure fairness; (3) confessions are not the

[7]For instance, the section of our constitution dealing with the right to counsel, Article 3, §26, is a "positive command, and without it due process of law is impossible." Stewart v. State, 229 So.2d 53, 55 (Miss.1969). See also Waldrop v. State, 506 So.2d 273, 275 (Miss.1987)("This Court has embraced a right to . . . counsel inherent in the due process clause of the state constitution."); Reed v. State, 430 So.2d 832, 837 (Miss.1983).

preferred form of evidence in a criminal prosecution; and (4) the accused should have counsel at all critical stages of the proceedings against him. I say these principles are embedded in our positive law in the sense that no honorable and rational person who rejected these principles in any significant way could possibly have written the rules in the field -- again from Section 26 of our bill of rights to the pre-trial provisions of our rules of criminal practice.

If the efficacy of our criminal justice system depends upon the accused not asserting or enjoying his claims and protections regarding access to counsel, then there is something very wrong with that system. I dare say no one can divine a policy of preference for ignorance or waiver in the valid rules in the field. No such policy fits the text of our rules in the field much less provides the best justification for the existence of those rules today. No one who believed that the efficacy of the criminal justice system ought depend upon a preference for ignorance of the accused or waiver of his right to counsel could possibly have written our law as it is; hence, the law cited by the majority cites -- but then ignores -- that there is a strong presumption against waivers of the protections of counsel.[8]

---

[8]See Michigan v. Jackson, 475 U.S. 625, 633, 106 S.Ct. 1404, 89 L.Ed.2d 631, 640 (1986); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461, 1466 (1938). A waiver ought be accepted only if made with full awareness of "the dangers and disadvantages of self-representation," Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); see also Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942) (accused "may waive his constitutional right to assistance of counsel

What we have said above regards the substance of the right to counsel. There is a separate and important concern regarding the form of that rule. Our law does no one a favor when it provides fuzzy rules in plastic form. Where tensions are high, controversy great, and much at stake (and there is never more at stake than in a case of capital murder), the need for bright line rules is at its highest. The form of the rule formally realizing the accused's right to counsel should provide an identifiable line between what may be done and what may not. All should be told that, once the right to counsel has attached, the accused may be dealt with only through counsel. Such clarity in expression is as important to law enforcement as to the citizen. See Arizona v. Roberson, 486 U.S. ___, 108 S.Ct. 704, 100 L.Ed.2d 704, 713 (1988). This is no novel idea. Did not even Miranda say as much?[9]

We have this sort of rule in civil cases. It seems to work well. Its predicate is fairness. If such a rule obtains in civil cases, where there is no constitutional right to counsel, what reason on principle can there be for denying a

---

if he knows what he is doing and his choice is made with his eyes open"). Indeed, "courts indulge in every reasonable presumption against waiver," Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424, 440 (1977). I am no devotee of subjective standards within our law. Still it takes little awareness or common sense to realize that objectively adequate warnings by an opposing party, whether detailed or cursory, simply cannot satisfy this high standard.

[9]"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. 436, 474, 86 S.Ct. 1602, 16 L.Ed.2d 694, 723 (1966).

like rule in a criminal case where there is such a right?[10] If the rule obtains in civil cases where mere money is at stake, why not where the executioner approaches?

I respectfully dissent.

GRIFFIN, J., NOT PARTICIPATING

[10] State v. Sparklin, 296 Ore. 65, 672 P.2d 1183, 1187 (1983); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 898 (1976).

EXHIBIT B

SUPREME COURT OF MISSISSIPPI
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March 2, 1989

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RE: Robert Minnick v. State
No. DP-79
Petition for Rehearing

Ladies and Gentlemen:

In connection with its consideration of the petition for rehearing in the above case, the Court desires a supplemental brief from each of you.

We invite your comments on the recent decision of the Supreme Court of Georgia in Roper v. State, 375 S.E.2d 600 (Ga.1989), decided February 2, 1989, and, particularly, your views on whether Roper is a correct exposition of the law and, if so, upon the effect, if any, Roper might have on the case at bar.

This is to advise that each of you have until March 21, 1989, to file your supplemental brief.

Sincerely yours,

ANN D. WHITTEN
Court Administrator

WEDNESDAY, OCTOBER 25, 1989 :

EN BANC

03-DP- 0079 Robert S. Minnick v. State of Mississippi: Appeal No. 6045 from Judgment dated MAY 23, 1987, Clarke County Circuit Court: DISPOSITION - On Change of Venue to Lowndes County. Petition for Rehearing Denied. Roy Noble Lee, C.J., Hawkins, P.J., Dan Lee, P.J., and Anderson, J., Concur. Prather, Robertson, and Sullivan, JJ. Dissent. Pittman and Blass, JJ., Not Participating.

ATTEST
A True Copy
This the 16th day of
December A.D. 19 89
SUE GORDON CLERK
SUPREME COURT OF MISSISSIPPI
By [illegible]

ORIGINAL

NO. ~~88-6332~~ 89-6332

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 TERM

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ROBERT S. MINNICK — PETITIONER

VERSUS

STATE OF MISSISSIPPI — RESPONDENT

==========

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTION PRESENTED

PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF HIS CONFESSION INTO EVIDENCE.

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NO. 88-6332

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 TERM

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ROBERT S. MINNICK PETITIONER

VERSUS

STATE OF MISSISSIPPI RESPONDENT

==========

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as Minnick v. State, 551 So.2d 77 (Miss. 1988). A copy of this opinion is before this Court as an appendix to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment V, VI, VII and XIV.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY:

Petitioner was indicted by the grand jury of the Circuit Court of Clarke County, Mississippi on September 9, 1986 for two counts of capital murder. This indictment was for the robbery and murders of Lamar Lafferty and Donald Ellis Thomas. Minnick was also indicted as an habitual offender. A motion for change of venue was granted and the trial was moved to Lowndes County, Mississippi for trial. The trial began on April 6, 1987. The jury returned a verdict of guilty as charged of both capital murders. At the conclusion of the sentence phase of the trial, on April 9, 1987, the jury returned a sentence of death for each capital murder conviction.

Minnick then took his automatic appeal to the Mississippi Supreme Court raising twenty-one (21) assignments of error. On December 14, 1988, the Mississippi Supreme Court, by an eight to one vote, affirmed the convictions and sentences of death in a written opinion. Minnick v. State, 551 So.2d 77 (Miss. 1988). A timely petition for rehearing was filed by petitioner with the court below. Response by the state was called for and supplemental briefs were also called for by

the Court. On October 25, 1989 the court denied the petition for rehearing without further opinion. From the opinion affirming the convictions and sentences of death petitioner brings this petition for certiorari.

B. FACTUAL HISTORY:

This case began on April 25, 1986 with the escape of Robert Minnick and James "Monkey" Dyess from the Clarke County, Mississippi Jail. Having successfully absconded from the jail Minnick and Dyess hid in the woods over night. In the early afternoon they approached the mobile home of Donald Ellis Thomas in rural Clarke County. They broke into the trailer to look for guns. As the were collecting the guns they found, Thomas returned home accompanied by Lamar Lafferty and his two-year-old son, Brandon Lafferty. Dyess jumped out of the trailer and shot Thomas the back with a shotgun and then in the head with a pistol. Minnick shot Lamar Lafferty. They put the Brandon Lafferty, the two-year-old, on the sofa in the living room of the trailer and continued collecting guns and ammunition in the trailer.

While petitioner and Dyess back inside the trailer another car arrived containing two girls, Marty Thomas, Ellis Thomas' younger sister, and Desiree (B.B.) Beech. Petitioner went out and met them. He was carrying a pistol. Petitioner told the driver to give him the keys and get out of the car if they wanted to live. They were marched to the back of the trailer where they were met by a big black man holding either

shotgun or rifle. They saw Ellis' truck and a Lamar Lafferty's body lying on the ground. Petitioner then took them inside the trailer where he made them lie on their stomachs and tied their hands and feet with haystring. Two-year-old Brandon Lafferty was sitting on the sofa. During this time Dyess was carrying guns out of the bedroom.

Petitioner told Marty and B.B. to tell the police that two black men had committed the crimes. He threatened to return and kill them if they did not tell this story. When all the guns had been removed from the house, petitioner and Dyess left.

The two girls then began attempting to get lose. They finally cut through the string binding their feet with their fingernails and then found a knife in the kitchen to cut their hands loose. They looked out the window, saw that Ellis' truck was gone and saw no one about. The gathered up the baby and got in their car and went to a friends house where they called the police.

Petitioner and Dyess apparently fled to New Orleans, Louisiana as Ellis' truck which was recovered in Florida on May 6, 1986 had New Orleans parking tickets under the seat. Assistance of the New Orleans Police Department was requested in an attempt to locate petitioner and Dyess. The search was fruitless as petitioner and Dyess had left New Orleans for Mexico by bus.

While in Mexico petitioner and Dyess had a disagreement and they parted company. Petitioner hitchhiked to California where he changed his name and procured a birth certificate and drivers license in the name of David Prokaska.

On August 22, 1986 petitioner was arrested in Lemon Grove, California. He was later transferred to the San Diego Police Department. The Mississippi authorities were contacted and Deputy Denham was dispatched to California on August 24, 1986.

Petitioner waived extradition and returned to Mississippi with Denham.

REASONS FOR DENYING THE WRIT

Petitioner's claim that the decision of the Mississippi Supreme Court has created a conflict among the decisions of the state supreme courts on the issue of the application of Edwards v. Arizona is not borne out by a review of the authorities cited by petitioner. The court below correctly held that petitioner waived his right to counsel after he made a limited invocation of his right to counsel. This waiver came after petitioner was furnished counsel and consulted with counsel of two or three occasions. Petitioner was fully aware of his rights when he agreed to speak with the Mississippi authorities. No overreaching occurred in obtaining the statements from petitioner.

Petitioner presents no cognizable claim under the

Constitution or statutes of the United States and therefore certiorari should be denied.

ARGUMENT

PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF HIS CONFESSION INTO EVIDENCE.

Petitioner claims that he was denied his rights under the Fifth Amendment and Sixth Amendment when his confession was admitted into evidence thereby violating Edwards v. Arizona, 451 U.S. 477 (1981). His contention is that once he has invoked his right to counsel and been furnished counsel he cane never waive the right to have counsel present when he is interrogated. A recitation of the factual setting of this case will best explain why petitioner validly waived his right to have counsel present when he gave his statement.

On August 22, 1986 petitioner was arrested by the Lemon Grove, California police. The basis of the arrest was the outstanding warrants from Clarke County, Mississippi for two counts of capital murder. Later that day he was transferred to the San Diego Police Department and the Mississippi authorities were notified of his arrest.

On August 23, 1986, unbeknownst to the Mississippi authorities, agents of the Federal Bureau of Investigation interviewed the appellant. During the interview appellant he was advises of his rights however he refused to sign a waiver of rights form. He answered some of the agents questions, but then ceased to answer any more. He told the agents,

"Come back Monday when I have a lawyer." The agents honored his request and ceased interrogation.

Petitioner was furnished an attorney after his request for one. He talked with the attorney two or three times over the weekend. The attorney told Minnick not to talk to anybody, not to tell anybody anything, not to sign any waivers and not to sign any extradition papers.

Deputy Denham from Clarke County, Mississippi arrived in San Diego late in the evening of August 24, 1986. He went to the San Diego jail and requested to see petitioner on the morning of August 25, 1986. Petitioner was brought to an interrogation room and Deputy Denham first advised him of his Miranda rights, however Minnick refused to sign a waiver form. Denham asked him if he wanted to talk about what happened. Instead of telling Denham that he did not want to answer any questions and that he had an attorney, Minnick replied, "Its been a long time since I've seen you." Minnick asked Denham about various folks back in Mississippi including his mother and brother. Denham then asked if Minnick would talk about the escape from the Clarke County jail. Minnick agreed to talk about the escape. This conversation led Minnick to confess his part in the robbery and murder of Thomas and Lafferty.

The trial court held a suppression hearing and held that Minnick's confession was the result of a free and voluntary

waiver of his right to counsel beyond a reasonable doubt.[1]

On direct review the court below in addressing the Fifth Amendment claim held:

> While it is true that Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him. In this kind of situation, the Edwards bright-line rule as to initiation does not apply. The key phrase in Edwards which applies here is "until counsel has been made available to him." Id. at 485, 101 S.Ct. at 1885. Since counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied. Therefore, this aspect of Minnick's argument is without merit. [Footnote omitted.]
>
> 551 So.2d at 83.

In response to the Sixth Amendment claim the court below held:

> . . . Minnick continued, freely and voluntarily, to talk about events after the jail escape. This evidence went virtually unrebutted because Minnick, when questioned about whether or not he voluntarily continued to talk about events after the jail escape, refused to testify further, invoking his Fifth Amendment right against self-incrimination.
>
> Under this factual scenario, it is evident that Minnick was aware of his rights, had been advised by an attorney prior to the conversation with Denham, was aware that he did not have to make any statements or answer any questions, and that he made a conscious decision to relinquish his Sixth Amendment right to counsel. The Trial judge so found, and under our often-articulated scope of review, this Court will not disturb a trial judge's findings at a suppression hearing unless manifestly in error or contrary to the overwhelming weight of the evidence.

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[1] While under the federal standard a confession has only to be proved free and voluntary by a preponderance of the evidence, under Mississippi law the standard is beyond a reasonable doubt.

> In so holding, we note that had Minnick at any point during his interview with Denham elected to have assistance of counsel before speaking further, the waiver would have immediately been dissolved. See Patterson v. Illinois, ___ U.S. ___, ___, 108 S.C.t 2389, 23 95, 101 L.Ed.2d 261, 272 (1988), n. 5. However, there is no evidence on the record that Minnick made any such request during Denham's interview. Therefore, we find no error in the lower court admitting the testimony as to Minnick's oral confession at trial. This assignment of error is without merit.
>
> 551 So.2d at 85.

At best the invocation of the right to counsel was limited in the case at bar. Petitioner's statement to the F.B.I agents questioning him makes this clear. He stated: "Come back Monday when I have a lawyer." 551 So.2d at 82. Looking to his testimony he stated:

> I told them I had to have a lawyer before I was able to make any statements about anything and I told them I was not signing anything because I had to have a lawyer to talk with before I could talk to any law official.
>
> 551 So.2d at 83, n. 1.

Miranda was not and is not a ruling that makes a defendant a prisoner of his won rights. Here appellant was furnished counsel, he was allowed to consult with counsel, he then chose to waive his right to counsel. He made a free will choice to talk with Deputy Denham, which he could have refused or terminated at any time. The determination of the court below that petitioner waived both his Fifth Amendment and Sixth Amendment rights was correct.[2] The court followed

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[2] Patterson v. Illinois, 487 U.S. ___. 108 S.Ct. ___, 101, L.Ed.2d 261 (1988) clearly held that what ever rights suffice for Miranda's purposes would also be sufficient to

the proper standards set forth in Oregon v. Bradshaw, 462 U.S. 1039 (1983), North Carolina v. Butler, 441 U.S. 369 (1979) and Brewer v. Williams, 430 U.S. 387 (1977) for determining whether or not there has been a waiver of the right to counsel. We must remember that Edwards is only a "prophylactic" rule that serves as an " auxiliary barrier against police coercion." The primary purpose of the rule is to protect an accused from any possible overreaching or coercion on the part of the police. The has been no distinct move to extend the Edwards rule to cases that do not demonstrate untoward conduct on the part of the police. Edwards was a clear case of police overreaching, a fact that is not present in the case at bar. The purpose of Miranda v. Arizona, 384 U.S. 436 (1966) was "to assure that the individuals's right to choose between speech and silence remains unfettered throughout the interrogation process." 384 U.S. at 469. Thus, absent any police overreaching this Court found no constitutional objective that would be served by suppression in this case.

Petitioner would have this Court adopt the draconian approach that once invoked one could never waive his right to have counsel present when he was interrogated no matter what the surrounding factual circumstances showed. He cites the decision of the Georgia Supreme Court in Roper v. State,

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waive ones Sixth Amendment right to have counsel present during interrogation.

375 S.E.2d 600 (Ga. 1989) in support of this premise. If petitioner's reasoning were correct we would not have had the decision in Connecticut v. Barret, 479 U.S. 523 (1987) or Griffin v. Lynaugh, 823 F.2d 856, reh. &'reh. en banc denied, 829 F.2d 1124 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1059, 98 L.Ed.2d 1021 (1988). In both those cases the only way that the authorities were able to obtain statements from the defendants was to question the defendants after there had been an invocation of the right to counsel. This invocation was of course held to be limited in both cases as it was in the case at bar.

As was the case in Griffin, the petitioner in this case consulted with his attorney after stating that he would speak to the authorities after he has talked with counsel. In fact he spoke with counsel not once, but twice and maybe three times over the weekend. That was all that he requested. He did not ask that his attorney be present when he was questioned, only that he would have to talk to an attorney before talking any further with the authorities. He consulted with counsel and then waived his presence. He had concluded his conversation with counsel at the time of the confession. This is not the case where petitioner was not allowed to complete his conversation with his counsel. In fact he had either two or three conversations with counsel before he met with Deputy Denham and waived his right to have counsel present. There was no trickery or overreaching by

the state officer. Petitioner was fully aware of his right to have his counsel present.

Petitioner attempts to paint a picture of a conflict of the federal circuits and the state supreme courts as grounds for granting certiorari in this case. He cites the us to the decision of the Seventh Circuit in United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied sub nom Fairman v. Espinoza, 483 U.S. 1010 (1987), as deciding the issue presented at bar differently than the court below and other federal circuits. Upon reading the opinion it is clear that the argument was not made nor did the Court consider the question of whether the petitioner therein had consulted with counsel and then later waived the presence of counsel.[3] We submit that Espinoza is factually distinguishable from the case at bar.[4] The other cases

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[3] The opinion in Espinoza shows that the petitioner accepted the offer of counsel at an arraignment. This was considered an invocation of counsel for all purposes. The same is not true in the case at bar, Minnick, by his own words stated that he would talk authorities again after he had consulted with counsel.

[4] Petitioner also cites us to United States v. D'Antoni, 856 F.2d 975 (7th Cir. 1988) and United States ex rel. Adkins v. Greer, 791 F.2d 590 (7th Cir. 1986), as further supporting his position of a conflict of the circuits. Neither of these cases are in conflict with principal adopted by the court below. D'Antoni involved a renewed questioning after the defendant had been unsuccessful in reaching his attorney. Adkins involved a question of whether or not one could be impeached with a confession taken in violation of Edwards. Neither of these cases is if conflict with the principle laid down by the Fifth Circuit or the Mississippi Supreme Court. There is not conflict of the circuits.

petitioner cites in an attempt to create a conflict of the circuits are factually distinguishable from the case at bar. They do not involve a question of an arrestee making a limited invocation of his right to counsel and having counsel furnished and then making a statement. In fact, most of the cases are only citing the phrase about "not subject to further interrogation" from Edwards to set the stage for their discussion of the merits of each case. Most often there was no relationship to the quotation and the decision of the case.

Looking to the state cases which petitioner asserts are in conflict with the Mississippi decision in this case we again find he has cited cases that are easily distinguishable on their facts. In fact, in some instances the actual facts are the opposite of that portrayed by petitioner in his brief. Looking to State v. Preston, 555 A.2d 360 (Vt. 1988). Petitioner states that the defendant consulted with counsel before interrogation. The opinion of the Vermont Supreme Court states clearly that the defendant had not consulted with appointed counsel. 555 A.2d at 361. In fact, the Miranda warnings were not even given until forty minutes after the questioning began in that case.

In State v. Perkins, 752 S.W.2d 567 (Mo. App. 1988), the very facts set out by petitioner in his petition clearly distinguish it from the case at bar. There after the defendant requested counsel the police sent an informant in

to question him. There was no furnishing of counsel and the informant did not give the defendant any warning that he had any right to refrain from talking with him. Further, he did not tell the defendant that he was working for the police.

In State v. Hartly, 511 A.2d 80 (N.J. 1986) the opinion of he New Jersey Supreme Court clearly states that counsel was not furnished after the request for one. Likewise, in State v. Warndahl, 436 N.W. 2d 770 (Minn. 1989) counsel was never furnished to the defendant. Further, the defendant initiated the further contact by requesting that the detective come and talk to him.

In People v. Trujillo, 773 P.2d 1086 (Colo. 1989) the defendant made a request for counsel and questioning stopped. The defendant was then released from custody. He was not furnished counsel. When he was arrested some seven weeks later he confessed after waiving his rights. The break in custody was the determining factor in this case.

The only case in which the facts remotely resemble the facts in the case at bar is Bussard v. State, 747 S.W.2d 71 (Ark. 1988). It to differs from the case at bar. When the defendant was arrested in Missouri he hired an attorney. After he was transferred to Arkansas he requested to make a telephone call. He was taken to the Sheriff's office where he made his call. The Sheriff then asked him if he were ready to talk about the crime. He signed a waiver and confessed. The facts in Bussard, differ in that there was no

conditional or limited assertion of the right to counsel. The defendant at no time indicated that he may be willing to talk to the authorities after he consulted with his attorney. In the case at bar the petitioner told the officers to come back on Monday after he had a chance to talk to his attorney and he might talk with them. Clearly there is a difference.

Finally, Roper v. State, 375 S.E.2d 600 (Ga. 1989) is distinguishable on the same ground as Bussard. There was no limited invocation of the right to counsel. While the counsel furnished him was for the purpose of advice on the question of extradition it was not a request limited to that matter. Extradition counsel and Roper did not discuss the substantive crimes, however the attorney told him not to talk to any one before consulting another attorney. The opinion of the Georgia Supreme Court seemed to turn on the fact that there was no limited request for counsel. Here there was a limited request. Petitioner told officers he would talk to them after he had a chance to speak with counsel. While the officer that talked to him did not know of this limited request it was clear that petitioner knew it and that is the operative factor. The intent of petitioner was clearly to speak further with the authorities after he had spoken with an attorney.

There is no clear conflict of the federal circuits or the state supreme courts on this issue. Petitioner was not

denied his Fifth Amendment or Sixth Amendment rights to counsel. Therefore certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

BY: Marvin L. White Jr.

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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above Brief in Opposition to the following:

Clive A. Stafford Smith, Esquire
185 Walton Street, N.W.
Atlanta, Georgia 30303

This the 7th day of March, 1990.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

AFFIDAVIT OF SERVICE OF PROCESS

I, Marvin L. White, Jr., being duly sworn, state the following:

1. I am a member of the bar of this Court and I am counsel for the Respondent in this action.

2. On March 7, 1990, I personally placed original and nine (9) copies of the enclosed Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Mississippi Supreme Court in the case of Robert S. Minnick v. State of Mississippi, No. 89-6332, in a package properly addressed to the Clerk of this Court, with first-class postage prepaid, and deposited the package in a mailbox under the exclusive control, care and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

3. I placed a copy of said Brief in Opposition to the Petition for Writ of Certiorari to the Mississippi Supreme Court in an envelope properly addressed to Clive A. Stafford Smith, 185 Walton Street, N.W., Atlanta, GA 30303 first-class postage prepaid, deposited the envelope in a mailbox under the exclusive control, care, and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

SWORN TO AND SUBSCRIBED BEFORE ME this, the 7th day of March, 1990.

Cassandra B. Carter
NOTARY PUBLIC

My Commission Expires:

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL
TELEFAX NUMBER (601) 359-3796
CARROLL GARTIN JUSTICE BUILDING
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE (601) 359-3680

MIKE MOORE
ATTORNEY GENERAL

March 7, 1990

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
One First Street, Northeast
Washington, D.C. 20453

RE: Robert S. Minnick v. State of Mississippi
No. 89-6332

Dear Mr. Spaniol:

Please find enclosed for filing the original and nine (9) copies of Respondent's Brief In Opposition and a copy of the Affidavit of Service of Process. Original of Affidavit of Service of Process is being sent under separate cover. By copy of this letter I am fowarding a copy this brief to counsel opposite.

Thank you for your assistance in this matter.

Very truly yours,

Marvin L. White, Jr.
Assistant Attorney General

MLW:jr/ds

Enclosures

cc: Honorable Clive A. Stafford Smith

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 89-6332

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

CLIVE A. STAFFORD SMITH
185 Walton Street, N.W.
Atlanta, Ga. 30303.
(404) 688-1202

Attorney for Mr. Minnick

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-6332

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

QUESTION PRESENTED

WHETHER, once an accused has invoked his Fifth Amendment right to counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?

TABLE OF CASES

FEDERAL CASES

Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987) 3, 4

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) 2, 3, 4, 5, 6, 7

Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) 2

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 3

Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) 2

United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied sub nom., Fairman v. Espinoza, 483 U.S. 1010, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987) 5, 6, 7

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State v. Preston, 555 A.2d 360 (Vt. 1988) 7

Roper v. State, 258 Ga. 847, 375 S.E.2d 600 (Ga.), cert. denied sub nom. Georgia v. Roper, 493 U.S. ___, 100 S. Ct. ___, 107 L. Ed. 2d 270 (1989) 6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-6332

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Robert Minnick files the following reply to the State of Mississippi's brief in opposition to his petition for a Writ of Certiorari to review the judgment of the Supreme Court of Mississippi, which affirmed his conviction and sentence of death. The decision below has now been reported. See Minnick v. State, 551 So. 2d 77 (Miss. 1988).

INTRODUCTION

Respondent argues that "Petitioner would have this Court adopt the draconian approach that once invoked one could never waive his right to have counsel present when he was interrogated

no matter what the surrounding factual circumstances showed." *Brief in Opposition at 10.* Respondent asks rhetorically whether Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), really made "a defendant a prisoner of his [own] rights." *Brief in Opposition at 9.*

If Respondent genuinely thinks this is what the issue is in this case, Respondent misperceives the point of Petitioner's claim. Certainly there are circumstances when an accused, who has invoked the protections of the Fifth Amendment, can waive his rights. For example, nobody would deny that the accused may initiate further discussions, and at that point waive his rights. See, e.g., Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

The prophylactic Edwards rule was adopted by this Court to "prevent the police from effectively 'overriding' a defendant's assertion of his Miranda rights by 'badgering' him into waiving those rights." Michigan v. Jackson, 475 U.S. 625, 638, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) (Rehnquist, J., dissenting). Everyone agrees that Edwards means that once the accused asserts his Fifth Amendment right to counsel, all police-initiated interrogation must cease until the right to counsel is honored.

The question which has confused the lower courts is what it means to honor the Edwards right to counsel. On the one hand, Edwards prohibits police-initiated interrogation "until counsel had been made available" to the accused who asserts his Fifth Amendment right. Relying on this language the Mississippi Su-

preme Court rejected Petitioner's claim, ruling that once Petitioner "was provided an attorney who advised him not to speak to anyone else . . . the Edwards bright-line rule as to initiation does not apply." Minnick v. State, 551 So. 2d at 83.

On the other hand, there are the cases which rely on other language in Edwards which requires that, once the right to counsel is invoked, all police-initiated "interrogation must cease until an attorney is present." Minnick v. State, 551 So. 2d at 104 (Robertson, J., dissenting)[1] (quoting Miranda v. Arizona, 384 U.S. 436, 474, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), quoted in Edwards v. Arizona, 451 U.S. at 485). Under this interpretation Petitioner's statement should have been suppressed, for the police cannot merely wait until after the accused has had a meeting with counsel, and then "badger" him again into waiving his rights.

I. THE CASES CITED BY RESPONDENT AS "CONTROLLING" CONCERN HOW THE FIFTH AMENDMENT RIGHT TO COUNSEL IS INVOKED, AND HAVE NOTHING TO DO WITH HOW THE RIGHT MAY EFFECTIVELY BE WAIVED ONCE IT HAS BEEN INVOKED.

Respondent argues that this Court has already decided that the authorities may legitimately re-initiate questioning to obtain statements from the accused even after there has been an invocation of the right to counsel. *Brief in Opposition at 11* (citing Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828, 93

1. On rehearing, two other justices joined Justice Robertson's dissent on this point. The final disposition of the case was therefore made on a 4-3 vote, two justices abstaining.

L. Ed. 2d 920 (1987)). Respondent argues that in Barrett the Fifth Amendment "invocation was of course held to be limited . . . as it was in the case at bar." *Brief in Opposition at 11 (emphasis supplied)*.

In Barrett the accused had agreed to speak to officers but refused to provide a written statement without a lawyer. This Court held that the invocation of the right to counsel was limited, and that an oral statement could validly be obtained.

Respondent now seeks to squeeze the facts of Petitioner's case into the rule of Barrett, stating that Petitioner "told the officers to come back on Monday after he had a chance to talk to his attorney and he might talk with them." *Brief in Opposition at 15 (emphasis supplied)*. If those were indeed the facts of the case, a close question would arise as to whether the invocation was limited.

However, the Mississippi Supreme Court explicitly found that Petitioner invoked his right to counsel saying, "Come back Monday when I have a lawyer." Minnick v. State, 551 So. 2d at 82 (emphasis supplied). There is no issue of limited invocation here, since the state court found that Petitioner "invoked his Fifth Amendment right to counsel. . . ." Id. at 83. Instead, the Supreme Court of Mississippi simply held that when the accused has been given counsel, "the Edwards bright-line rule as to initiation does not apply." Id.

Respondent now seeks to reinterpret the ruling of the Supreme Court of Mississippi. Respondent apparently concedes that

the court was wrong in holding that Edwards does not apply. Instead, Respondent proposes a new rule which would provide that an invocation of the right to counsel is only an invocation of the right to speak with counsel once. Under such a rule, a request for counsel would be fulfilled by one fleeting meeting, after which it would again be open season for the police to "badger" the accused until he confessed.

To the contrary, Edwards recognized that the invocation of the right to counsel effectively means that the accused "desire[s] to deal with the police only through counsel. . . ." Edwards, 451 U.S. at 484. While Petitioner may voluntarily change his mind and reinitiate contact, the "prophylactic" rule of Edwards assures him that he will not be subjected to continual harassment, "badgering" him into agreeing to give evidence against himself.

Respondent is seeking to avoid the interesting issue presented to this Court by saying that an invocation of the right to counsel is not an invocation of the right to counsel. However, a rose by any other name would smell as sweet. The confusion in the lower courts remains, and will only be compounded if more courts are persuaded to adopt Respondent's doublespeak.

II. NO AMOUNT OF REINTERPRETATION OF THE CASES CITED IN MR. MINNICK'S INITIAL PETITION CAN MASK THE FACT THAT THE LOWER COURTS ARE IN HOPELESS DISARRAY OVER THIS ISSUE.

Respondent's gallant effort United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied sub nom. Fairman v. Espinoza, 483 U.S. 1010, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987), is unconvincing. *Brief in Opposition at 12.* Similarly, the Georgia Supreme Court has reached diametrically the opposite conclusion to the Mississippi Supreme Court in Roper v. State, 258 Ga. 847, 375 S.E.2d 600 (Ga.), cert. denied sub nom. Georgia v. Roper, 493 U.S. ___, 100 S. Ct. ___, 107 L. Ed. 2d 270 (1989). Respondent basically argues that if Roper stands for Petitioner's proposition, the case was wrongly decided. *Brief in Opposition at 10-11.*

For the rest of the authority cited by Petitioner, Respondent seeks to distinguish the cases on their facts. To be sure, factual distinctions can be made between any two cases.[2] The reality is that these cases do stand for the legal proposition of Roper and Espinoza -- that Edwards prohibits police-initiated interrogation after invocation of the Fifth Amendment right to

2. Respondent's effort to distinguish Bussard v. State, 747 S.W.2d 71 (Ark. 1988), is more strained than most. Respondent misrepresents the finding of the Supreme Court of Mississippi, which explicitly held that Petitioner told the officers to "[c]ome back Monday when I have a lawyers", Minnick v. State, 551 So. 2d at 82 (emphasis supplied), not to come back "after he had a chance to talk to his attorney. . . ." *Brief in Opposition at 15.*

counsel.[3] Equally, Respondent does not challenge Petitioner's assertion that various cases take the other line on Edwards -- that one consultation with counsel is sufficient.

It is hard to make a case for harmony in the lower courts on this issue. This Court should resolve the question, and provide guidance on the true meaning of Edwards.

CONCLUSION

WHEREFORE, Petitioner Robert Minnick respectfully suggests that this Court should grant certiorari to review the decision of the court below.

Respectfully submitted,

CLIVE A. STAFFORD SMITH
185 Walton Street, N.W.
Atlanta, Ga. 30303.
(404) 688-1202

Attorney for Mr. Minnick

3. One distinction drawn by Respondent clearly has merit. Respondent is correct to note that in State v. Preston, 555 A.2d 360 (Vt. 1988), the Vermont court held that while the trial court had "appointed a public defender" the accused had apparently not yet actually consulted with the attorney. Id. at 361. The accused would prevail under these facts under either interpretation of Edwards. However, the Vermont court went on to specifically adopt the rule of United States ex rel. Espinoza v. Fairman, where the accused had had a meeting with counsel. Id. at 362.

Certificate of Service

I hereby certify that I have this day mailed a copy of the aforegoing document to the following person:

Marvin L. White, Jr.
Assistant Attorney General,
P.O. Box 220,
Jackson, Ms. 39205.

This, the 12th day of March, 1990.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

No. 89-6332

AFFIDAVIT OF COUNSEL

STATE OF GEORGIA

COUNTY OF FULTON

COMES NOW, CLIVE A. STAFFORD SMITH, being duly sworn, and hereby deposes and states as follows:

1. I make this affidavit pursuant to *U. S. S. Ct. Rule 28.2.*

2. I am admitted to the bar of the Supreme Court of the United States.

3. I personally verified that a Reply to Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Mississippi was mailed this day to the Clerk of this Court by first class mail. The document is therefore filed.

Done, this the 12th day of March, 1990.

CLIVE A. STAFFORD SMITH

Sworn and subscribed to before
me this 12th day of March, 1990

NOTARY PUBLIC

Notary Public, Fulton County, Georgia
My Commission Expires June 9, 1991

(5)

No. 89-6332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT S. MINNICK,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 19, 1989
CERTIORARI GRANTED APRIL 23, 1990

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Excerpt from Trial Transcript (Arrest warrants for Robert S. Minnick for capital murder dated May 6, 1986) (Tr. E-121 and E-123) ..... JA 7

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Mississippi Proceedings

April 9, 1987	Order entered by Circuit Court for Lowndes County, Mississippi (Hon. L.F. Williamson) sentencing petitioner to death after jury found him guilty of capital murder and imposed death sentence
June 12, 1987	Petitioner files notice of appeal to the Mississippi Supreme Court
December 14, 1988	Opinion of Mississippi Supreme Court affirming petitioner's conviction of capital murder and death sentence
October 25, 1989	Order of Mississippi Supreme Court denying petitioner's motion for rehearing
April 23, 1990	Order of the United States Supreme Court granting petition for writ of certiorari and motion for leave to proceed *in forma pauperis*

Excerpt from Trial Transcript (Affidavit of Sheriff David Earl Williams and attached Statement of Underlying Facts and Circumstances and Affidavits of Tommy Touchstone in support of two warrants for arrest of Robert S. Minnick for capital murder all dated May 6, 1986) (Tr. E-116 to E-120)

Affidavit in State Cases

THE STATE OF MISSISSIPPI

CLARKE COUNTY

Before me, Clarke County Justice Court Judge, Tommy Touchstone of the said Clarke County, David Earl Williams, Sheriff of Clarke County, Mississippi, makes oath that JAMES (MONKEY) DYESS and ROBERT S. MINNICK on or about the 26th day of April, 1986, in Clarke County, did unlawfully, wilfully, and feloniously kill and murder LAMAR LAFFERTY and ELLIS THOMAS, human beings, with or without design to effect death, without authority of law, while they the said JAMES (MONKEY) DYESS and ROBERT S. MINNICK were then and there engaged in the commission of the crime of robbery in violation of § 97-3-19(2)(e), Mississippi Code Annotated, against the peace and dignity of the State of Mississippi.

And in support of said David Earl Williams, Sheriff of Clarke County, states under oath the underlining [*sic*] facts and circumstances incorporate[d] herein by reference as part of this affidavit. (see exhibit 1).

/s/ David E. Williams
DAVID EARL WILLIAMS
SHERIFF OF CLARKE COUNTY

SWORN TO AND SUBSCRIBED before me, the 6th day of May, 1986.

/s/ Tommy Touchstone
JUSTICE COURT JUDGE

UNDERLYING FACTS AND CIRCUMSTANCES
[Exhibit 1]

I, David Earl Williams, Sheriff of Clarke County, Mississippi, being duly sworn testify, to-wit:

The following facts and circumstances were investigated by Clarke County Sheriff's Office in conjunction with Mississippi Highway Patrol, Mississippi State Crime Lab, Jasper County Sheriff's Office, and Constables of Clarke County:

1. On April 25th, 1986, James Monkey Dyess was in custody of Clarke County Sheriff's Jail, having been convicted and sentenced to serve seven (7) years in an institution designated by the Mississippi Board of Corrections on the charge of Burglary of a Storehouse.
2. On April 25th, 1986, Robert S. Minnick was in custody of Clarke County Jail, having been previously sentenced to serve eight (8) years on the charge of Robbery on a previous date in an institution designated by the Mississippi Board of Corrections.
3. On April 25th, 1986, James (Monkey) Dyess and Robert S. Minnick escaped from the Clarke County Jail while serving sentences in the above described charges awaiting confinement in the Mississippi Department of Corrections.
4. On April 26th, 1986, Theodus Pryor, citizen of Clarke County, was hunting in the Beaver Damn Community, and saw a white person and a black person, matching the description of Dyess and Minnick, walking down a road. Mr. Pryor saw Dyess and Minnick around 8:00 A.M. on Saturday, April 26th, 1986, approximately two and one half miles from victim Thomas's house.
5. On April 26th, 1986, approximately 2:00 P.M., Marty Thomas and B.B. Beech, two (2) thirteen year old female

children visited Ellis Thomas's trailer in the Beaver Damn Community, Clarke County, Mississippi.

6. Upon approaching the trailer, Ms. Thomas and Ms. Beech were met by a white male, approximately 22 years old, short hair, medium build, approximately 5'9" tall, who threatened Ms. Thomas and Ms. Beech with a hand-gun and took them into Donald Ellis Thomas's trailer located in the Beaver Damn Community in Clarke County and tied them up. Ms. Beech and Ms. Thomas saw the bloody body of Lamar Lafferty at the east end of trailer.

7. While tied up in the trailer, Ms. Beech and Ms. Thomas saw another person with the person later identified as Robert Minnick, a black male approximately 6'2", 200 pounds, approximately 25 years old, assisting Mr. Minnick.

8. Both Ms. Thomas and Ms. Beech later identified a photo lineup of Robert S. Minnick a. [illegible]ames (Monkey) Dyess as persons who threatened and [illegible]d them up at Mr. Donald Ellis Thomas's trailer.

9. Both the original physical description of both Marty Thomas and B.B. Beech matched the description of Dyess and Minnick and upon showing of photo lineup, both Ms. Thomas and Ms. Beech identified Dyess and Minnick as the persons present in the trailer during this period of time.

10. Approximately 4:00 P.M. on April 26th, 1986, Marty Thomas and B.B. Beech reported to the Jasper County Sheriff's Office what had occurred to them in Donald Ellis Thomas's trailer house. In addition, Ms. Thomas and Ms. Beech saw the bloody body outside the trailer.

11. Upon determination that the trailer located in Clarke County, Clarke County Sheriff's Office was called to investigate the incident; the bodies found in Clarke County, Miss.

12. Upon arrival of the Clarke County Sheriff's Office, Lamar Lafferty, age 26, white male, and Donald Ellis Thomas, age 22, were found approximately 50 yards in a gully behind the trailer; each had been shot in the head at close range.

13. Upon request for autopsy, medical examiner Thomas Bennett performed an autopsy and determined that Donald Ellis Thomas, age 22, white male, was shot one (1) time in the back and one (1) time in the head, cause of death was violent homicidal. Upon examination of the autopsy of Lamar Lafferty, medical examiner determined that Lafferty was shot twice in the head, cause of death was violent homicidal.

14. Upon investigation of contents, Donald Ellis Thomas's trailer by members of his family in conjunction with the Clarke County's Sheriff's Office, the following property was missing:
    1. .41 caliber muzzle loading rifle
    2. one (1) Winchester 12 gauge shotgun, serial #L15153093
    3. one Browning 270 rifle, serial #137PM03183
    4. one (1) 12 gauge shotgun
    5. one (1) 20 gauge shotgun
    6. one (1) 22 caliber pistol
    7. ammunition

    In addition the 1982 Ford pickup, silver gray truck, license Mississippi #CE4607 was stolen from Donald Ellis Thomas.

15. In addition upon investigation of the bodies of Lamar Lafferty and Donald Ellis Thomas, it was determined that both victims' wallets containing driver's license, money, and identification were missing.

16. Later, on April 26th, 1986, driver's license of the victims' were found on the side of the road three (3) or four (4) miles from the place where Lafferty's and Thomas's bodies were found.

17. Based on all the above described facts and circumstances and in addition to the oral testimony given to the Court an arrest warrant on the charge of Capital Murder and an arrest warrant on the charge of Escape are requested.

/s/ David E. Williams
AFFIANT

SWORN TO AND SUBSCRIBED before me, this the 6th day of May, 1986.

/s/ Tommy Touchstone
JUSTICE COURT JUDGE

Excerpt from Trial Transcript (Arrest warrants for Robert S. Minnick for capital murder dated May 6, 1986) (Tr. E-121 and E-123)

WARRANT IN STATE CASES

THE STATE OF MISSISSIPPI,
CLARKE COUNTY

To The Sheriff or any Constable of said County:

WE COMMAND YOU to forthwith take the body of Robert S. Minnick charged with the crime of Capital Murder of LAMAR LAFFERTY in violation of § 97-3-19(2)(e) Mississippi Code Annotated (1972) in Clarke County, and bring him before the undersigned Justice Court Judge for an examination on said charge.

Witness my hand this 6th day of May, 1986.

/s/ Tommy Touchstone
Justice Court Judge

WARRANT IN STATE CASES

THE STATE OF MISSISSIPPI,
CLARKE COUNTY

To The Sheriff or any Constable of said County:

WE COMMAND YOU to forthwith take the body of Robert S. Minnick charged with the crime of Capital Murder of DONALD ELLIS THOMAS in violation of § 97-3-19(2)(e) Mississippi Code Annotated (1972) in Clarke County, and bring him before the undersigned Justice Court Judge for an examination on said charge.

Witness my hand this 6th day of May, 1986.

/s/ Tommy Touchstone
Justice Court Judge/Clerk

Excerpt from Trial Transcript (Hearing Exhibit No. 2; "Interrogation; Advice of Rights" dated August 25, 1986) (E-2)

Robert S. Minnick
8 OCT 1963
SSN: 336-56-4167

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place	San Diego Co. Jail
Date	25 August 1986
Time	Time 08:40 Hrs.

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind had been used against me.

Signed Refused to Sign

Witness: /s/ J.C. Denham Inv. CCSD
Witness:

Time: 08:45 Aug. 25, 1986

Hearing 2/3/87

Excerpt from Trial Transcript (Hearing Exhibit No. 3; Handwritten notes of Deputy Sheriff J.C. Denham dated August 25, 1986; two documents: one captioned "Re: Jail Escape", one captioned "Re: Thomas Lafferty Homicides") (E-3 to E-7)

Re: Jail Escape:

Interview of Robert S. Minnick August 25, 1986
25 August 1986
San Diego County Jail

On Monday, August 25, 1986 at approx. 08:40 hours this office interviewed Robert S. Minnick at the San Diego County Jail. Minnick was advised of his Miranda rights prior to being interviewed.

Robert Minnick advised this officer of his escape from the Clarke County Jail. Minnick advised he and Dyess left the jail cell after the supper meal and the trash being taken out. Minnick advised he was behind the door holding it when the trusty closed and locked it. Minnick advised the way he held the door the trusty would think the door was locked.

Minnick advised he and Dyess then left out of the cell thru the fire escape door and over the fence. After clearing the fence Minnick and Dyess ran down the railroad tracks to near Desoto and west into the woods.

/s/ J.C. Denham
Inv. CCSD
Hearing
2/3/87

Interview of Robert Minnick August 25, 1986
Re: Thomas-Lafferty Homicides
25 August 1986
San Diego County Jail

On Monday August 25, 1986 at approx. 08:40 hours this officer interviewed Robert S. Minnick at the San Diego

County California Jail. Minnick was advised of his Miranda rights prior to being interviewed.

Minnick advised this officer of his actions concerning the deaths of Thomas and Lafferty. Minnick advised he and Dyess were in the woods walking. Minnick advised Dyess had told him that he knew the area real well. Minnick advised they walked in the woods for a long way. Minnick advised along the way they came across a turkey hunter and talked with him for a few minutes. Minnick advised they continued on walking and came out of the woods near a trailer.

Minnick advised Dyess told him he knew the trailer had some guns in it. Minnick advised they entered the trailer and found some guns and started collecting them up when they heard a vehicle drive up in the yard of the trailer. Minnick advised the two men and a small child stayed out in the yard for a few minutes. Minnick advised when they started toward the trailer Dyess jumped out the trailer door with a shotgun. At this point Minnick advised Dyess shot one of the men in the back with a shotgun and then in the head with a pistol. After doing this Dyess gave Minnick the pistol and made him shoot the other man while Dyess held a shotgun to Minnick's head.

Minnick advised they put the 2 yr. old child on the sofa in the trailer and Dyess drug the bodies to a gully behind the house trailer and threw them in it. Minnick advised two young girls drove up to the trailer. The girls were brought into the trailer and tied up. Minnick advised Dyess was wanting to rape and kill these girls and it was all he could do to keep from letting him do this.

Minnick advised they took the weapons from the trailer and left in the Silver Ford pickup truck. Minnick advised they took $121.00 in money from the bodies of the two men. They left and traveled south on I-59 and Hwy 11 to New Orleans.

Minnick advised after they got to New Orleans, La. they went to a guy's business who Dyess had known before. Minnick advised Dyess talked with the guy about selling the guns to him. Minnick advised they later sold the guns to this person and stayed around New Orleans for a period of time in

the Skylite Motel. Minnick advised this officer the 22 caliber pistol was thrown into a thrash can in New Orleans.

Minnick advised after leaving New Orleans by bus to Brownsville, Texas, they crossed the border into Mexico. Minnick advised they were staying in Matamoros, Mexico when he and Dyess got into a fight and Dyess tried to kill him. Minnick advised after being severely beaten by Dyess he was able to escape.

Minnick advised he then hitchhiked to California. Once getting to California he came to the San Diego area and got in touch with some friends he knew when he lived in San Diego in 1982.

Minnick advised he was using the name David Bruce Prokaska. He obtained a Drivers License, Birth Certificate and voter registration to match this ident.

/s/ J.C. Denham
Inv. C.C.S.D.

Excerpt from Trial Transcript (Hearing Exhibit No. 4; Federal Bureau of Investigation typed report dated August 23, 24, 25, 1986) (E-8 to E-10)

FEDERAL BUREAU OF INVESTIGATION
1

Date of Transcription: August 25, 1986

ROBERT SAMUEL MINNICK, was interviewed in a private room at the SAN DIEGO COUNTY JAIL. He was advised of the official identities of ALFRED GARY GUNN and JOHN H. ALLISON as Special Agents (SA) of the FEDERAL BUREAU OF INVESTIGATION (FBI) by display of credentials. SA GUNN asked "Are you ROBERT SAMUEL MINNICK?" MINNICK replied "That's what they call me." He was shown a facsimile photograph of CLARKE COUNTY inmate number 62034 taken April 21, 1986, and asked if the picture was him. MINNICK asked what this was all about. SA GUNN advised him that he was being interviewed concerning federal charges for fleeing the State of Mississippi after an escape from a Mississippi jail and murder of two persons.

MINNICK was observed to have a tattoo on his left forearm with the words "Rock & Roll Rebel." He also had a cross on the web of his right hand. GUNN commented on the scar over the right eyebrow which is visible in the photograph and on MINNICK's face.

Investigation on August 23, 1986 at San Diego, California
File SD 88A-9742

SA's ALFRED GARY GUNN AND
By JOHN H. ALLISON/mas Date dictated August 24, 1986

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency and it and its contents are not to be distributed outside your agency.

SA GUNN read the Advice of Rights part of the FD-395 (Interrogation; Advice of Rights form) and further advised MINNICK that he would probably be scheduled to appear in State Court on Monday morning, at which time an attorney would be assigned to him to represent him concerning all charges against him. SA GUNN asked MINNICK if he understood his rights, which MINNICK said that he did.

SA GUNN asked MINNICK to read the waiver part of the form and sign it if he was willing to answer questions at this time. MINNICK stated "I don't want to sign anything."

SA GUNN read the waiver to MINNICK and asked him if he understood and was willing to answer questions without an attorney present, and repeated that MINNICK could stop answering questions at any time and could choose what questions he wanted to answer.

MINNICK stated that he did not want to make a full statement or answer "very many" questions, indicating that he was willing to answer some questions. He asked what consequences he was facing. SA GUNN advised him that he was facing murder charges with a possible death penalty or life imprisonment in Mississippi. SA GUNN further advised him that anything he said would be reported to federal and state prosecutors, and that, together with the physical evidence at the scenes of the crimes in Mississippi, would be considered at trial.

MINNICK told the Agents to ask what questions they wanted to ask.

SA GUNN stated that the FBI wants to locate "MONKEY" DYESS. SA ALLISON asked where DYESS was at the time. MINNICK paused in his answer, and SA GUNN stated that the FBI believes DYESS is very dangerous. MINNICK said that DYESS was very dangerous, that he had given MINNICK the scar on his right eyebrow, and at this point MINNICK began to sob. He said "It was my life or theirs." Then he told how DYESS "beat the heck out of me" and showed marks by his right ear, nose and sinus area, and pointed to the top of his head as well as his eyebrow. He said that he was beat a couple of days or a week after the "mobile home." Speaking

of DYESS, MINNICK said "He was threatening me" right from the beginning.

MINNICK said that he wanted to leave DYESS, that he did not want to travel with him, but that DYESS made him stay with him.

SA GUNN commented that it appeared that MINNICK may have spared the lives of two other people, at which time MINNICK sobbed and said "He wanted to kill them to," referring to DYESS.

When he regained his composure, MINNICK stated that he was in jail in Mississippi for stealing a car belonging to a person who he knew who was drunk, who later reported the car stolen. He had been in CLARKE COUNTY JAIL eight to ten months and MONKEY DYESS had been there part of the time, and part of the time he was away. Authorities had sent DYESS to prison elsewhere and he had run away from there, and had then been returned to the CLARKE COUNTY JAIL, where he and MINNICK were together again. MINNICK stated that it was DYESS' idea to escape, and MINNICK went along because he did not want to serve the time facing him.

After they escaped, MINNICK and DYESS "ran and ran." MINNICK just wanted to run and get away. He stated, "We got on the road," and then we "came to the trailer." DYESS knew that there were guns in the trailer and told MINNICK that "that would be our ticket out of town." MINNICK said DYESS "would make bad faces at me" (threatening faces) and would tell MINNICK that he had to go with him. MINNICK explained that MONKEY DYESS is a "very big dude" who had already "been down" (meaning, been in prison) seven years and was "looking at" two to five years more. As they ran, MONKEY seemed to know the territory, and would not sleep and "would not let me sleep." They ran through woods and down tracks until they came to the trailer. That was when MONKEY said that the trailer would be their ticket out of town. DYESS said nothing about a vehicle, but was interested in getting the guns from the trailer. He seemed to know ahead of time that there were guns in the trailer.

At this point of the interview, MINNICK hesitated to tell what had happened at the trailer. He was reminded by inter-

viewing agents that he did not have to answer questions without his lawyer present and that he could choose which questions he wanted to respond to or could just tell the story himself.

MINNICK stated "Come back Monday when I have a lawyer," and stated that he would make a more complete statement then with his lawyer present.

At this point no further questions were asked concerning the crimes, and MINNICK furnished the following descriptive information concerning himself.

Date of birth:	September 8, 1963
Age:	22
Place of birth:	Springfield, Tennessee
Height:	5'8"
Weight:	150 pounds
Hair:	Brown
Eyes:	Blue
Tattoos displayed:	"Rock & Roll Rebel" with a little bearded man on left forearm, cross on web of right hand

He stated that when he was arrested he was carrying identification in the name of DAVID BRUCE PROKASKA, who was a nonexistant [*sic*] person.

MINNICK repeated twice his request that Agents come to see him on Monday as soon as he had a lawyer.

Excerpt from Trial Transcript (Motion to Suppress Statement dated December 5, 1986) (Tr. 20-21)

IN THE CIRCUIT COURT OF
CLARKE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS

ROBERT MINNICK

MOTION TO SUPPRESS STATEMENTS

Comes now the defendant and files this motion to suppress statements and would show:

1. The defendant is in informed and believes that the State of Mississippi intends to offer evidence to the effect that Robert Minnick made statements to FBI agents and to other police officers, and the defendant would show that the statements should be suppressed.

2. None of the statements were voluntary.

3. None of the statements were made at a time when the defendant had access to counsel, and the defendant did not waive his right to the assistance of counsel. In fact the defendant affirmatively indicated the desire to have the assistance of counsel.

4. The defendant made no knowing and intelligent waiver of his rights.

5. The defendant was under much duress. When he was arrested, a swat team descended on him. Because of the circumstances of his arrest, his lack of representation by counsel, his lack of understanding of his constitutional rights, his interrogation by numerous law officers, the continual intimidation by law officers, the failure by the State of California to properly provide for him an initial appearance, the fear and lack of understanding by the defendant, his young age,

his lack of mental stability, the period of time that he was held in jail before he was interviewed, and the combined coercive interviews of numerous law officers, the defendant made involuntary statements.

6. There was no probable cause for the defendant's arrest, and his statements were fruit of the poisonous tree.

7. Wherefore, the defendant moves the Court to suppress his statements. The defendant requests that on a hearing of this matter, the State will be required to produce all officers that interviewed the defendant.

Respectfully submitted.

ROBERT MINNICK

BY: /s/ Leslie Gates

LESLIE GATES, HIS ATTORNEY
101 SHIELDS BLDG.
906 20TH AVENUE
MERIDIAN, MS. 39301
693-5967

CERTIFICATE OF SERVICE

This certifies that I have delivered a true and correct copy of the above and foregoing motion to Honorable Charles Wright this 5th day of December, 1986.

/s/ Leslie Gates

Excerpt from Trial Transcript (Bench Ruling by Court denying Motion to Suppress Statement dated February 3, 1987) (Tr. 348)

BY THE COURT: Well, you made a motion to suppress statements and I will suppress all statements made to people who were police officers in California, but I will allow Mr. Denham to state to a jury what he stated here today and I wouldn't allow him to introduce the statement into evidence which has been marked Exhibit 3. Mr. Wright, you have read Espidido versus Illinois [*sic*] and [*blank in original*] versus Williams.

Excerpt from Trial Transcript (Order Overruling Motion to Suppress Statement dated February 3, 1987) (Tr. 49)

IN THE CIRCUIT COURT OF
CLARKE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI	PLAINTIFF
VERSUS	6045
ROBERT MINNICK	DEFENDANT

ORDER OVERRULING MOTION TO
SUPPRESS STATEMENTS

There came before the Court the defendant's motion to suppress statements, which the Court finds should be overruled as to statements given to J. C. Denham, and which the Court finds should be sustained as to other statements.

It is therefore ordered and adjudged that J. C. Denham may testify in front of the jury as to the oral statement given to him, but all other statements given or allegedly given by the defendant to law officers shall be suppressed.

So ordered this 3rd day of February, 1987.

/s/ L.F. Williams
CIRCUIT JUDGE

/s/ C.W. Wright
DA

As to Form:

/s/ Leslie Gates

Excerpt from Trial Transcript (Renewed Motion to Suppress Statement dated February 5, 1987) (Tr. 55)

IN THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI	PLAINTIFF
VERSUS	6045
ROBERT MINNICK	DEFENDANT

RENEWED MOTION TO SUPPRESS STATEMENT

Comes now the defendant and would show:

1. The defendant would show that there exists the additional reasons for suppression of statement as follows:

A. The statement was made with counsel not present during a critical stage of the proceedings, to-wit: extradition. Possibly counsel had already been appointed.

B. The statement may have been given in an interview that was in violation of a court order.

C. The statement given to Denham was the product of a previously coerced statement and is therefore fruit of the forbidden tree.

2. Wherefore, the defendant respectfully requests reconsideration of the Court's earlier ruling.

Respectfully submitted.

ROBERT MINNICK

/s/ Leslie Gates
BY: Leslie Gates, his attorney
101 SHIELDS BUILDING
906 20th AVENUE
MERIDIAN, MS. 39301
693-5967

CERTIFICATE OF SERVICE

This certifies that I have delivered a true and correct copy of the above and foregoing motion to Honorable Charles Wright, District Attorney for the Tenth Circuit District of Mississippi, on this 4th of February, 1987.

/s/ Leslie Gates

Excerpt from Trial Transcript (Renewed Motion to Suppress Statement dated April 6, 1987) (Tr. 187)

IN THE CIRCUIT COURT OF
CLARKE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS

ROBERT MINNICK

RENEWED MOTION TO SUPPRESS STATEMENT

Comes now the defendant and would show:

1. The defendant renews his previous motion to suppress his alleged statement.

2. The alleged statement falls squarely within the rule announced in the case *Edwards* v. *Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880. In that case, as in this case, there was custodial interrogation in which the individual in custody invoked his right to remain silent and his right to counsel; thereafter, the individual was again approached by the police and questioned and at that time the individual gave a statement. The United States Supreme Court said that the second questioning was violative of the defendant's right to have counsel present at the custodial interrogation.

3. Respectfully submitted.

Robert Minnick

BY: /s/ Leslie Gates

Leslie Gates
101 Shields Bldg.
906 20th Avenue
Meridian, Ms. 39301
693-5967

CERTIFICATE OF SERVICE

This certifies that I have delivered a true and correct copy of the above and foregoing motion to Honorable Charles Wright this 6th day of April, 1987.

/s/ Leslie Gates

Excerpt from Trial Transcript (Order Denying Renewed Motion to Suppress) (Tr. 957-58)

BY THE COURT: For the benefit of the Court Reporter confession and the questions asked by the deputy sheriff in the opinion of the Court were freely and voluntarily made by the defendant, his answers, and I believe from the evidence beyond a reasonable doubt that the confession was freely and voluntarily given, that he understood his rights.

BY MR. WRIGHT: Assumption of understandable waiver of rights. That he understood his rights?

BY THE COURT: That the defendant understood his rights.

BY MR. GATES: Does the Court find that there was a waiver of his right to counsel, right to remain silent?

BY THE COURT: Yes, sir. I find that the confession was freely and voluntarily given from the evidence beyond a reasonable doubt and it can be used and shown to the jury as such.

BY MR. GATES. Your Honor, does the Court find there was a knowing, intelligent waiver of his right to counsel, right to remain silent?

BY THE COURT: I find that the statement of the deputy sheriff was given freely and voluntarily by him to the defendant and that he responded freely and voluntarily as the confession states from the evidence beyond a reasonable doubt. Bring the jury in. W o do you have as your next witness?

Excerpt from Trial Testimony (Testimony *in limine* of Deputy Sheriff J.C. Denham) (Tr. 299-318)

J. C. DENHAM

having been called as a witness by the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. WRIGHT:

Q State your name.

A J. C. Denham.

Q You have given your occupation as Deputy Sheriff of Clarke County?

A Yes, sir.

Q And, you previously testified as to your background in law enforcement?

A Yes, sir.

Q You have some fourteen years experience?

A Yes, sir.

Q Do you know one Robert S. Minnick?

A Yes, sir.

Q Were you involved in the investigation of the death of Lamar Lafferty and Donald Ellis Thomas?

A Yes, sir.

Q And, on or about the 26th day of '86 of April the 26th, did you obtain the warrants for the arrest of Mr. Minnick?

A No, sir. The warrants were issued for Robert S. Minnick, I believe, on May the 6th.

Q And, at that time did you also—what were the warrants for—his arrest for?

A Two counts of capital murder.

Q Did you also request assistance from the States Attorney's office through the District Attorney in the Tenth Circuit Court District?

A Yes, sir.

Q And, did you request for interstate flight warrants?

A Yes, sir. They were requested to be issued on Robert Minnick and James Dyess.

Q Do you have knowledge that they were issued on those persons?

A Yes, sir.

Q While doing that were you contacted from the State of California, particlarly, San Diego, pertaining to the arrest of Robert S. Minnick?

A Yes, sir. I was notified on August 22nd, 1986.

Q And, who notified you?

A The San Diego Sheriff's Department.

Q And, what were you notified at that time?

A That they had arrested a subject there in San Diego fitting the description of Robert S. Minnick.

Q What authority did they arrest him?

A As unlawful flight.

Q And, was this with any assistance of the FBI?

A Not to my knowledge.

Q And, the procedure on unlawful flight is that the warrants would be shown on a National Crime Information Center network computer?

A Yes, sir. We were contacted by telephone and by NCIC, being the National Crime Information Center of Robert S. Minnick's arrest.

Q And, there were how many outstanding warrants for Robert S. Minnick?

A Two. Two on state charges and one on federal.

Q After that day did they give you a description of the person that they arrested that they thought was Robert Minnick?

A Yes, sir. The officer I talked with described the subject to me, gave me some locations of some tatoos and those coincided with the description of Robert Minnick.

Q What did you then proceed to do?

A They then held him on charges from Clarke County Mississippi until I arrived out there on August the 24th, 1986.

Q Did you see Mr. Minnick that day?

A No, sir. I talked with him on the next day August the 25th.

Q And, where did you talk with him?

A I interviewed him in the San Diego County Jail.

Q About what time was it on the 25th?
A Approximately 8:40 in the morning.
Q And, do you see the same Robert S. Minnick here in this court room?
A Yes, sir. To my left sitting at the table.

BY MR. WRIGHT: Let the record reflect he identified the defendant Robert Minnick.

Q Now, where were you able to interview Mr. Minnick?
A He was interviewed in an interview room inside the county jail.
Q Who was present?
A Myself and Mr. Minnick.
Q And, in what city was this?
A San Diego, California.
Q And, in what office were you interviewing him?
A The interview room was a plain office with open plate glass windows all the way around where you can see in and out.
Q Now, in this interview how big a room is it?
A Approximately 10 x 10.
Q How long was the interview?
A Approximately forty-five minutes to an hour.
Q Now, did you make any notes of your interview?
A Yes, sir. Before talking to Mr. Minnick I advised him of his Miranda Rights and read it from a form we use here in the Sheriff's Department.
Q Do you have that original form that you had on that day?
A Yes, sir.
Q And, would you tell the Court exactly the procedure you followed when you informed him of his rights?
A Before I talked to him I advised him of his rights and I can read from this form what I advised him of.
Q Do it just like you did that day.
A Before I talked to him, I said, "Before I ask you any questions, you must understand your rights. You have a right to remain silent. Anything you say can be used against you in court. You have a right to talk with a lawyer for advice

before answering any questions and have him with you during questioning. If you cannot afford a lawyer one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk with a lawyer." After advising him of this he refused to sign saying he wasn't going to give any signed statement but that he would talk to me.
Q Did he state whether or not he understood his rights?
A Yes.
Q. Did you read him anything pertaining to that waiver of rights?
A I gave him the waiver and after I read the waiver, which is, "I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."
Q Did you read that also to him?
A Yes, sir.
Q Did he state whether or not be understood his rights?
A Yes, sir.
Q Did he state whether or not he wanted an attorney present?
A He didn't ask to have a lawyer present while he talked to me.
Q Now, did you make notes, original notes, of this waiver that you described to the Court?
A This is the original waiver.

(Mr. Wright shows item to counsel opposite.)

BY MR. WRIGHT: The State moves to have this admitted as exhibit to this witness' testimony.

(ITEM IS RECEIVED AND MARKED AS EXHIBIT NO. 2 AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME

AT PAGE [*blank in original*] AND MADE A PART OF THIS RECORD.)

Q Now, Mr. Denham, did you use any threats or coercion on the defendant Minnick to get him to talk to you after he stated he understood his rights?

A No, sir.

Q Did you have any weapon on you that you pulled on him?

A No, sir.

Q Did you slap him or hit him?

A No, sir.

Q Did you make any promises to him?

A No, sir.

Q Did you make any threats to him?

A No, sir.

Q Did you deny him any rights that he had?

A No, sir. I asked him if he wanted to talk to me about what happened and he said, yes, he did.

Q That was after you informed him of what his rights were?

A Yes, sir.

Q Now, at this time did you write out a statement or did you listen to—how did you conduct the interview?

A After talking with him and leaving the jail where he was located I then wrote down what he said.

Q Do you have your original notes of what he said?

A Yes, sir.

(Mr. Wright shows item to opposing counsel.)

BY MR. WRIGHT: The State requests this be marked as Exhibit 3.

BY THE COURT: Very well.

(ITEM IS RECEIVED AND MARKED AS EXHIBIT 3 AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE _____ [*blank in original*] AND MADE A PART OF THIS RECORD.)

Q Now, Officer Denham, after informing him of his rights could you tell if he was under the influence of alcohol or drugs?

A He was not at that time.

Q Did he talk to you freely at that time?

A Yes, sir.

BY THE COURT: Do you know how long he'd been in jail?

A Since Friday afternoon, the 22nd, and I talked to him Saturday morning, the 25th—Monday morning the 25th.

Q Was it Monday morning or—

A Monday morning the 25th.

Q And, directing your attention to that time that you talked to him you made him no promises of any kind.

A No, sir.

Q Now, in conducting the interview what's the first thing that you said? Tell me what the interview consisted of.

A After advising him of his rights and asking him if he wanted to talk to me about what happened. He said it had been a long time since he had seen me and since being out in California every day he talked like he would look up and think he might see someone from here looking for him. And, at that time I asked him if—you know—if he would tell me what happened as far as them leaving the jail and what took place the next day. And, from there we started talking and he started telling me about what happened.

Q What did you say and what did he say?

A I asked him—you know—just tell me what went on first concerning how they got out of the jail and he told me that he and Dyess had been planning on escaping out of the jail the evening they broke out which was a Friday, that after the supper meal—

• • •

[*argument of counsel omitted*]

Q Do you need your notes to refresh your memory?

A Yes, sir.

Q Now, what is the first thing that the defendant Minnick told you?

A He told me about how he and James Dyess got out of the Clarke County Jail.

Q What did he say?

A He said that they had been planning on getting out on the Friday that they escaped out of the jail. They waited until after the supper meal for the trash to be taken out and when the trusty came back to unlock the door and pulled the trash—garbage cans and bags out—when he pushed the door back Minnick held the door and when the trusty turned the lock it looked like it was locked and in actuality it wouldn't be.

• • •

[argument of counsel omitted]

Q Will you continue?

A Yes, sir. He said after the trusty pulled the garbage out and closed the door back and turned the key he was holding the door where it would look like it would be locked but it wasn't. They said they waited—he said they waited a few minutes after the trusty left out of the jail, went out of the jail door back to the fire escape door and over the fence and left Quitman getting into the woods going south down the railroad tracks.

Q Did you ask him any other questions pertaining to where they went after they escaped jail?

A Yes, sir. Then I asked him what they did after they got out of town into the woods. They advised that they walked in the woods all night and the next day he said Dyess told him he knew the area well below Quitman and said while they were walking in the woods they came upon a person turkey hunting. They stopped and talked to him a few minutes and—you know—continued on walking until they came out of the woods at the edge of a field where they came up on a trailer and Dyess told Minnick that he knew the trailer would have some guns in it. At that time they went to the trailer and went inside. He said after they were inside the trailer taking the guns they heard a vehicle drive up and looked out

and seen two men and a young child outside. They said the two men and child stayed outside a few minutes and when they started walking to the back of the trailer they jumped out the back door and Dyess shot one of the men in the back with a shotgun and then shot the same person in the head with a pistol, gave Minnick the pistol and made him shoot the other man in the head with the pistol. He said after this happened they started to pull the bodies in the gully behind the house and two girls drove up. When the two girls drove up they brought them into the house and tied them up. After tying the girls up and taking the weapons in the house they left in a silver Ford truck which belonged to one of the victims.

Q Now, did they tell you as to what Dyess wanted to do to the girls?

A Minnick said that Dyess wanted to kill the girls or rape them. Said it was all he could do to keep Dyess from raping or killing the girls.

Q Did he advise you as to any money he got?

A Yes, sir. He said that they took approximately a hundred and twenty-one dollars from the bodies of the two men.

Q Did he say where they went?

A After they left there in the truck they traveled to New Orleans and once they reached New Orleans they went to a person that Dyess knew down there and sold him some of the guns they took out of the trailer to this person. They stayed in New Orleans for a while at the Star Light Motel. After leaving New Orleans went to Brownsville, Texas and then over into north Mexico. He said at that time he and Dyess got into a fight and he was able to get away from him and at that time he traveled on to California.

Q Did he state whether or not Dyess tried to kill him?

A Yes, sir. He said that they got into a fight and he was able to get away from him. He also said concerning the pistol—I asked him about the pistol and he said he threw the pistol in a garbage can in New Orleans.

Q When Minnick and Dyess broke up did he state what type of fight they had?

A Just that they had gotten into a fight. He didn't indicate for what reason.

Q Now, did he tell you how he got to California?

A By hitchhiking.

Q What did he say he did in California after he got there?

A Once he got to California he got in contact with a friend of his that he used to be buddies with in Gadsden, Alabama and was living with him and after reaching California he obtained a California driver's license and birth certificate under the name of David Bruce Prokaska and had a voter registration card to match that, also.

Q Was this a written statement or an oral statement?

A It was an oral statement that I wrote down what I remembered after I left him in the jail.

Q And, did you make notes pertaining to what Minnick had said to you in San Diego?

A Yes, sir.

Q Is that in Exhibit 3?

A Yes, sir.

Q And, are those the original notes?

A Yes, sir.

Q At any time did Mr. Minnick request an attorney?

A No, sir. Not during the time I was talking with him.

Q At any time did you make any promises to him?

A No, sir.

Q Did you threaten him in any way?

A No, sir.

Q Now, pertaining to Mr. Minnick how long did this interview last?

A Somewhere in the neighborhood of forty-five minutes to an hour.

Q How did you conclude the interview?

A That—you know—I was through talking to him.

Q Did you leave the room at that time?

A Yes, sir. And, the people in the Sheriff's Department took him back to his cell.

Q Now, pertaining to Mr. Minnick prior to this occasion was this the first problem he ever had with the law?

A No, sir.

Q What is his prior record?

A Here in Clarke County he had been arrested previously for armed robbery charge.

Q Had he been convicted of that charge?

A Yes, sir.

Q And, during the investigation of that case were you the investigating officer?

A Yes, sir.

Q And, in fact, you had informed him of his rights here in Clarke County, haven't you?

A Yes, sir.

Q On previous occasion. Had he had a record from California?

A Yes, sir.

Q What was that record?

A Armed robbery and assault charge.

Q And, he was convicted of that felony and received a penitentiary sentence there, also, didn't he?

A Yes, sir.

Q So, his prior background was that he was familiar with the Miranda Rights, wasn't he?

A Yes, sir.

Q Now, directing your attention—

BY MR. GATES: I object to that statement from the District Attorney that's a conclusion of the witness.

BY THE COURT: Be sustained.

Q After this day did you continue to be in San Diego, California?

A Yes, sir.

Q How often did you see Mr. Minnick?

A I did not see him again until after he had signed a waiver to come back to Mississippi voluntarily. He was brought back by myself and Deputy Robert Owen.

Q You're telling this Court he waived formal extradition and came back freely and voluntarily?

A Yes, sir.

Q And, that was down at the San Diego court?

A Yes, sir.

Q Once on the airplane did you continue to talk to him about what occurred?

A He would talk on and off to myself and Deputy Owen.

Q Did you try to commence any type conversation concerning the murder investigation on the airplane?

A No, sir.

Q Do you recall anything that he said to you on the airplane?

A There was something said concerning that he and Dyess would have been okay if they had been like Jesse James and split the money evenly but he didn't do him right and that's what he got mad at Dyess about.

Q Is that all you recall that was said on the airplane pertaining to the murder?

A Yes, sir.

Q And, when did you arrive back in Mississippi?

A On the 29th.

BY MR. WRIGHT: The Court's indulgence.

Q When you interviewed the defendant Minnick did he appear to understand what you were talking about?

A Yes, sir.

Q Could you communicate and you understand what he said and he understand what you said?

A Yes, sir.

Q How old was he at the time of the interview?

A Twenty-two or something like that.

Q Did he appear to be mentally unstable?

A No, sir. He understood what we were talking about.

Q In fact, he freely and voluntarily waived extradition to come back some three days after the interview?

A Yes, sir.

BY MR. WRIGHT: No further questions.

BY THE COURT: Cross examination

CROSS EXAMINATION BY MR. GATES:

Q Are you familiar with this whole case?

A Yes, sir.

Q Did you know he was interviewed before—after being arrested in California?

A Did I know that at this time or—at which time did I—

Q You know it now?

A Yes, sir.

BY THE COURT: What was that question?

BY MR. GATES: That he was interviewed in California before Mr. Denham interviewed him.

BY THE COURT: By some law enforcement officer from Mississippi?

BY MR. GATES: No. I think it—I believe it was somewhere else.

Q Do you know, though?

A It was from the FBI in San Diego.

Q San Diego police or the FBI in San Diego?

A San Diego FBI.

Q Okay. Are you—do you know that he was arrested by a SWAT team?

A Yes, sir.

Q Do you know if he was roughed up when he was arrested?

A No, sir.

Q You don't have any information that he was roughed up when he was arrested?

A None was indicated to me.

Q Do you know that he—did you know that he never talked to a judge in between the time when he was arrested and the time he talked to you?

A Did I know that?

Q Yes, sir.

A No, sir.

Q Do you have any information to think he would have an opportunity to speak to a judge before you interviewed him?

A I don't know. I arrived there Sunday night and talked to him Monday.

Q When you talked to him did you say something to the effect, "I'm not wired."

A He asked me if I was recording anything and I said I didn't have a recorder or anything on.

Q He didn't sign a waiver of rights.

A He said he would not give me a signed statement.

Q He didn't sign the statement you prepared?

A No.

Q Did you offer that to him to sign?

A I asked him but he refused to give a signed statement.

Q Okay. Did you know that when the FBI man interviewed him at one point he stopped and asked to speak to an attorney?

A No, sir. I wasn't present when that interview took place.

Q Okay. Did you have information in your possession or that you know of to that effect?

A I would have a copy of the interview that the FBI conducted.

Q Does that not reflect that at one point he asked the FBI man—said he wanted to speak to an attorney?

A I don't know. I don't have it in front of me.

Q Okay. To your knowledge, did he interview any other persons other than the FBI?

A Repeat the question.

Q Was he interviewed by any other person other than the FBI and yourself?

A Not to my knowledge.

Q Do you know how many people were present when the FBI man interviewed him?

A No, sir.

Q Do you know whether or not he signed a waiver or rights when he was interviewed by the FBI man?

A I was not present when the interview took place.

Q As far as your information that you have do you have any information showing that he ever signed a waiver of rights in connection with making a statement?

A I do not know.

Q You don't know anything about what the FBI man said to him when he was interviewed by the FBI man?

A It would only be the information received by reading what the interview consisted of.

Q Do you know that he was detained in jail from the time he was arrested until the time you got there?

A He was incarcerated. Yes, sir.

Q And, do you have any reason to think he had an opportunity to speak to a lawyer between the time he was arrested and the time you interviewed him?

A I do not know.

Q Was he kept in the same jail to your knowledge from the time he was arrested to the time you interviewed him?

A I do not know.

Q Do you know anything about the circumstances of his detention?

A No, sir. He was in the San Diego County Jail, central lockup in San Diego cell when I arrived there.

Q Would you look at that and see if you can identify it?

BY MR. WRIGHT: May I see what you're handing the witness?

(Mr. Gates shows item to Mr. Wright.)

Q Is that FBI—is that your information about the—is that information the same thing you have about the FBI interview?

A Yes, sir. Yes, it is.

BY MR. GATES: I will offer this.

BY MR. WRIGHT: The State doesn't object to it as being a report from the FBI that was in the possession of the Sheriff's office, which I furnished to defense counsel but as to the hearsay aspect of it the State does object to it.

BY THE COURT: Well, I will let it be marked and made evidence for the purpose of my ruling on your motion to suppress the statements.

(ITEM IS RECEIVED AND MARKED AS EXHIBIT NO. 4 INTO EVIDENCE, AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE NO. ____ [*blank in original*], AND IS MADE A PART OF THIS RECORD.)

BY MR. GATES: That's all the questions.

BY MR. WRIGHT: No further questions.

* * *

Excerpt from Trial Transcript
(Testimony *in limine* of Robert S. Minnick) (Tr. 319-37)

ROBERT MINNICK

called as a witness, and having been previously sworn, testified as follows:

DIRECT EXAMINATION OF MR. GATES:

BY MR. GATES: I'm not wanting him to testify as to the substance of the statement, if any, but just as to what happened before it was made.

BY THE COURT: Ask him any question you like.

Q Would you state your name?
A Robert Samuel Minnick.
Q Okay. Do you recall the circumstances of your arrest in California?
A Yes, sir.
Q Okay. Where were you when you were arrested, what town?
A Lemon Grove, California.
Q What were you doing at that time?
A Getting out of a truck. Just getting off from work and in a grocery store parking lot where we parked the truck.
Q What occurred?
A I walked around the front of the truck and two men dressed in civilian clothes with a badge in their hands pulled a .357 Magnums on me and and hollered at me which was—I didn't understand why—what they said because they shocked me to see the guns pointed at me and I immediately turned and ran and they chased me a block and tackled me on a gravel ground and beat me in the back of my neck and my back to where it caused me severe back pain for about four months afterwards. They carried me back across the street to where several other officers come around and they made very rude accusations toward me as being a southern hillbilly murderer and that I should have part of my—pardon the vulgar language—but I should have my nuts cut off and that they

should take me out and kill me and throw me in a ocean somewhere. As I was trying to tell a man named Dave to tell everybody else goodbye at the house they slammed my head down on the back of the trunk of the car. At that time one of them asked me was I Robert Minnick and I stated the name that I had papers for and he jerked my arm—my left arm—around behind me to where it hurt me severely and should have broke, I think—to look at the tatoo on my left arm and he said, "Yes, this is Robert Minnick." And, they carried me—they put handcuffs on me and several of them kept coming by and squeezing them tighter on my wrists and they carried me to Lemon Grove city jail.

Q Excuse me. But, do you recall any of these police officers names or did you—

A I was not able to see or get an answer from any of them as far as the names.

Q Do you know who they were police for?

A The Lemon Grove Police Department to the best of my knowledge. As we arrived at the Lemon Grove Police Department they took me in a small holding cell and literally slammed me against the wall and squeezing tighter on the cuffs and talking all kind of obscenities to me which I don't recall the full extent of them but they were getting pretty bad. And, one of them, which I don't know punched me in the back a few times and made my back pain even worse than they were. And, then they left out of there and locked the door and they went and searched through my personal property and I noticed a couple of things in there that were of value one of the officers put in his pocket—which I don't know.

Q How big was the holding cell?

A About as big around as this place right here where I'm sitting—square.

Q How long were you in there?

A Just long enough for them to get two other prisoners and go through my property I had extensively—I mean, pardon me—three other prisoners. They put the four of us in the back of a Lemon Grove Police Department car which was cramped and they kept on squeezing on our handcuffs and I

kept asking them to take them off and they just kept squeezing. We drove to San Diego County Jail—

Q Did other persons go with you?

A There was three other people, three other prisoners, in the car and two police officers in the front. We drove to the San Diego County Police Department and as arriving there a person being brought in to be booked goes in downstairs into a small holding area until their names and everything is got from them and then they go into a little bit larger holding area with some fifteen or twenty people in there. They kept us in there until they took us—several of us into the next room and strip-searched us and they carried us—carried several of the inmates there upstairs to a holding cell and they carried me around to a separate single holding cell and made several accusations and was trying to coerce me into talking to them about the charges they said I had placed on me.

Q How many men were present at that time?

A There were two officers present in the holding cell with me at that time.

Q Were they armed or unarmed?

A They were unarmed because no officer was allowed to carry a gun but they did have their sticks on their belt.

Q How long did they talk to you?

A Not very long. I don't know exactly because I wouldn't tell them nothing and I didn't look at them. I didn't say anything to them at all because I was made to understand beforehand that the San Diego Police Department was not very nice.

Q How big was the holding cell?

A Regular size holding cell, 10×10 or 12×12, something like that. They then carried me upstairs to the cell area and put me in a cell up there with several other inmates which were already sentenced county prisoners. I can't recall the exact date—I was there from 8/22 to 8/29, which was one week exactly—sometime within the first two or three days several officers come to talk to me. Two of the officers called theirselves FBI agents and I told them immediately that I did not have a lawyer and that I needed to have a lawyer sitting with me. They run off a whole slew of different things about

the charges on me, about the extent of what was going to be done to me physically as being hurt along the way and possibly killed on death row at a later day and that it was nothing that I could do about it no kind of way.

Q How long had you been in the cell or the jail before the officers came to talk to you?

A I'm not sure exactly but as I stated I believe it was two or three days they come—it might have been the second day that I was there. It was fairly quick after I arrived there.

Q Okay. Before they came had you talked to a judge?

A No. I hadn't talked to anybody. I had requested a lawyer immediately I got there and I was told that I wouldn't be able to be appointed to a lawyer until court session was run and I would be carried upstairs and it would take a day or so to get ahold of a lawyer and wouldn't be able to talk to him until the day after that I was appointed one. Which I don't know the exact date when they carried me up there but it was some four or five days after I was there and the lawyer told me not to talk to anybody. And, after several officers had already talked to me he made—he had requested of the judge and strict court order that no officer outside of the San Diego Police Department be able to confer with me at all, which I related to the FBI officers and, also, Officer Jim Denham and also the San Diego fugitive corps—or whatever that meant. There was one man from that organization and they told me that didn't mean nothing that they were going to talk to me anyhow. Back to sitting with the FBI men for the first time, they—

Q Let me ask you this. Did you say that you had talked to a lawyer before you talked to the FBI?

A No. I had not talked to no lawyer before I talked to the FBI people and I told them that I wanted a lawyer and I would not sit and talk with anybody without a lawyer and that I wasn't signing any papers, no waivers, no rights, waivers, anything, I wasn't signing anything and I was not going to talk to them and they set and drilled me on questions more of where Monkey Dyess was at and where I left him and slightly on the charges pending me now.

Q What about this order that you talked about about nobody but the San Diego police, when did that happen?

A When—the day after I was appointed the lawyer if I'm not mistaken, he told me—he did drill me on had I talked to anybody or has anyone, officer or organization come to talk to me about my charges. He told me not to talk to nobody and that when he went in the next time to the court he was going to get a court order showing that no officer outside the San Diego Police Department could converse with me. The following day he advised me that this court order was in effect and that anybody that come to talk to me that I was not to go talk to them. When the officers did come to talk to me the San Diego jailers came up to the cell and got me out. They had a paper in their hand saying who it was to visit me and what organization they was from. And, on the first side of the paper reading the FBI I refused and they made me go down anyhow. They didn't physically force me but they told me I was going to have to go down or else. Nothing else. On the arrival of Jim Denham they told me that I was going to have to go down there and talk to him because he was the man that was coming up to extradite me back to Mississippi and that I would have to talk to him, that I could not refuse and so I went and talked to the different people at different periods of time.

Q When you talked to the FBI man did you ever—was there more than one FBI man or do you know?

A There was two FBI officers and the one that was—they were facing me—the one on the left of me on the table was trying to be nice and compassionate, per se, and the one to the right of me started getting voicely violent, making threats of, "We'll make things very hard on you. We have hands everywhere and things can be really rough for you along the line unless you contend to what we want you to tell us." And, at that time they started filling out waiver of rights paper and, also was reading my rights to me and I told them to stop writing because I wasn't signing anything for them and that I did not have a lawyer yet and this is when the FBI officers talked to me the first time. And, they started—they brought out composite drawings, one of myself and one of

Monkey Dyess, and asked me was that me and I said that it wasn't a very good picture and they had—they had no physical pictures at all. All they had was one composite drawing of myself and one of Monkey Dyess. And, then they went to drilling me on questions of the murder scene because they already had several facts of what they called happened at this murder scene.

Q What did you say in response to those questions?

A I did tell them that I escaped from the Clarke County Jail and I told them that we left there and got on the railroad tracks and Monkey Dyess said he was going to Shubuta and I told him that I wasn't going to Shubuta with him and from there he went our own separate ways and I ended up on Interstate 59 headed toward New Orleans and went from there to California and I stayed on the east side of California for two weeks when I first got there at some friend's house and then later got to San Diego, California and pretty much stayed on the street for the first two months or so and was doing—I had a couple of odd jobs working with a fellow doing landscaping and janitorial service.

Q Did you ever ask to stop talking to the FBI man?

A As I was saying, they drilled me on several questions of the incident and I told them about leaving the jail and that's all I told them. I told them I had to have a lawyer before I was able to make any statements about anything and I told them I was not signing any rights waiver or I was not signing anything because I had to have a lawyer to talk with before I could talk to any law official.

Q What was your lawyer that you talked to—name?

A I don't recall his name.

Q How long did you talk to him?

A I talked to him two different times and—it might have been three different times—but I talked to him the day he told me the next day he would get the court order. He told me that first day that he was my lawyer and that he was appointed to me and to not talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police—I advised him of

the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department. And, the next day he showed me—well, he didn't show me—he had papers in his hand and he told me he did have the court order that I was not to talk to any police officer—or he recommended somehow or another through the court from them doing so and as of going into the room with the different officers they told me that lawyer wasn't nothing—that's their words—and that the paper didn't mean nothing, that I had to talk to them.

Q What was your state of mind when you talked to Mr. Denham?

A My mind—I was extremely on the edge, very ragged tempered at the time, and to be pinpointed severely upset through the ordeal because my physical and mental anguish placed on me by different police officers had caused me to retract into my inner person at that time.

Q What, if any, type of promises did he make to you?

A No one made any promises except they told me if I went along with them they would sure stand up in court and tell the court that I helped them out and please show mercy on me.

Q Who made that statement?

A The FBI made the statements about—and—just the FBI made statements to that. Also, when the FBI come to see me at Brandon and you was with me they also made the same statement, per se. And, I told them I wasn't telling them nothing because I had nothing to tell them and they left.

Q What, if any, promises did Mr. Denham make?

A We went through a hair-wired number of different conversations over past escapes. We went into minute details of the escape and if I—I'm not sure if I should correct him or not. Should I?

Q I don't understand your question.

A Jim Denham—try to correct something that he stated here on the stand. He stated that I told him about the door being pushed to and them locking it? Okay. The door was never locked at any time by anyone and it was by all means a

civilian running the turnkey at the jail, which is federally illegal.

Q But, what if any, promises did he make to you?

A He made no specific promises of any kind but told me that if I would go along with his story and help him out on this whole thing things would turn well for me in court, these are extremely severe charges and I needed every anchor that I could have to help me out.

Q What, if any, type of threats did he make?

A He didn't exactly make any direct threats but he told me things could extremely turn hard on me depending on which way, which side of the fence that I walked on. And, I told him that I had to have me a lawyer after going through minute details of the immediate escape from the jail, which we went over a time or two. If it please the Court, my statement is over and I stand on the Fifth as of now.

Q Let me ask you this. Let me ask you a question. If you don't want to answer—do you consider that this statement was voluntary or involuntary?

A I give no direct statement of any kind concerning any murder charges or anything being on the run with Monkey Dyess, nothing that is on paper which I have read. Everything is put down, I advised this, I advised that, I advised this, I advised that. They have no signature and no coercing ears that can say that I give any sort of statement of any kind freely or voluntary to any police officer for anything. I refused and I deny anything put down on paper being that I said so and so, except and excluding the immediate escape from the county jail, which I will state I fully to the best of my knowledge I did escape from the county jail. They have me dead to rights on that and there is no way around it, but outside of that time I left from Clarke County, I left from the State of Mississippi, headed directly towards California by way of several different towns that I stopped.

Q You gave no voluntary statement?

A I gave no free or voluntary statement to any officer concerning any murder charges.

BY MR. GATES: No questions.

BY MR. WRIGHT: I've got some questions on cross examination.

BY THE COURT: Go ahead and ask them.

CROSS EXAMINATION BY MR. WRIGHT:

Q Sit down and I'll ask you some questions. Now, Mr. Minnick, pertaining to your rights form, you know what the Miranda Rights are, don't you?

A That I had a right to remain silent and so on and so forth?

Q Yes.

A I have heard it spoke to me before on several occasions.

Q The truth of the matter is you've been informed of these rights on several occasions prior to August the 25th, 1986, haven't you?

A The Lemon Grove Police Department did not read my rights. The San Diego Police Department did not read me my rights. I was read my rights when I was caught on the robbery charge I have a sentence of eight years in Campier, Louisiana by one officer and no other. And, I believe I was read my rights after I arrived at the county jail by Robert Owens or Jim Denham, one of the two. I was read my rights by the FBI agent in San Diego County Jail and I was read my rights by the FBI agent in Pearl, Mississippi—Brandon, Mississippi, whichever of the two. And, Jim Denham, also did not read me anything. He had no paperwork at all but he, per se, recited my rights to me and I directly spoke to him and told him that I was refusing to sign anything about anything and I was not waive any rights and at that time I had told them I was not going to sign extradition but after seeing that lawyer and their full case load I thought there is no reason for me to stay here in California when this is going to come up sooner or later. I'm sure would have went through and I didn't see any reason to fight extradition so I signed it so the law here in Clarke County could go ahead and bring me here to Clarke County, Mississippi.

Q Deputy Denham did inform you of your rights, didn't he?

A I can't recall exactly what he said but he recited something he called rights to me and I was not able to read anything of rights waiver or any—you know—because he had no paperwork whatsoever.

Q You stated to him you refused to sign a waiver of rights but you were willing to talk to him, didn't you?

A Not exactly those words. I told him—well, actually it was nothing official at all and there weren't no statements official from him in any kind of way. We went through several different conversations about—first, about how everybody was back in the county jail and what everybody was doing, had he heard from Mama and had he went and talked to Mama and had he seen my brother, Tracy, and several different other questions pertaining to such things as that. And, we went off into how the escape went down at the county jail and I deny his remark saying that I had stated that it was ever any kind of premeditation. It was an instant, spontaneous thing that happened for my person and the incident with the door being pulled to without ever being locked it went down several months beforehand on the trusties just strickly to see if it could be done as a trick on the trusties and it was immediately corrected.

Q And, then you got into what happened when Lafferty and Thomas were killed, didn't you?

A I have no comments on that and I stand on the Fifth Amendment.

Q And, at no time did Officer Denham beat you in that interview, did he?

A I have no comment on that and I stand on the Fifth Amendment.

Q At no time did he threaten you in any way, did he?

A I have no comment on that and I stand on the Fifth Amendment.

Q At no time did he make you any promises of leniency, did he?

A I have already stated something to that effect and it's on the record and if it please the Court and Your Honor, I

refuse to answer anything else from the D.A. and I stand on the Fifth Amendment.

BY MR. WRIGHT: If it please the Court, Your Honor, he does not have that right simply not to answer questions on this motion. He cannot take the stand and give a self-serving statement and then not allow me to cross examine him within the purview of the rules.

BY THE COURT: Cross examine him all you like, but he might not answer.

Q You don't always tell the truth, do you, Minnick?

A I will answer that and I have propounded myself to the best of my knowledge all my life as from turning a middle-age teenager up to now as to doing my best to keep from lying to anybody—

Q What have you been previously convicted of, Mr. Minnick?

A I have—you have that on record, thank you.

Q No. You answer the question. What have you been previously convicted of?

A I was convicted of assault with a deadly weapon—

BY MR. GATES: I object to that. I don't see how it relates to this motion—

A It don't have anything related to this motion.

BY MR. WRIGHT: Proper impeachment, Your Honor. He's making certain statements under oath. I have a right to impeach him as to his truthfulness.

A Okay. That's fine. I'll answer it. There's no problem with that. It's all on record. I was sentenced to three years state time in the State of California for ADW, which is assault with a deadly weapon, which was a plea of guilty to a lesser charge because the lawyer I had was not any good. After arriving at prison and studying law for my own person in the law library, I found I could have answered that, stand in court and prove me in front of a jury, five stab wounds—what he called five stab wounds—he could not have done it

and him and his lawyer and doctors which was on the statement of the court would have sentenced to thirty years minimum time in the State of California for perjury in the United States Court.

Q What else were you convicted of?

A I was convicted of robbery in Clarke County, Mississippi which was also a plea to a lesser charge, which I got it down to eight years through my lawyer on motion which could have gotten it down more, I believe. Also, with the agreement that Robert Glass, which was a friend of mine that happened to be with me would be cut loose completely from—

Q What about Camery, Louisiana? What were you convicted of there?

A Campier, Louisiana?

Q Yes.

A I've been convicted of nothing there. That's where they caught me in the, per se, man's car that's supposed that Robert Glass and I stole at Enterprise down here in Clarke County on the interstate.

Q The truth of the matter is you know what your rights are and you are informed of your rights and you understood your rights, didn't you?

A I understood my rights and that's exactly why I told them that I wanted a lawyer and they was getting no kind of anything out of me for anything except when I talked to Jim Denham and stated the exact moment and the happenings of the escape from the Clarke County Jail.

Q But, you continued to talk on to Mr. Denham about what happened in the murder, didn't you?

A You only have that down on paper. I'm denying that completely. I have already denied what he has down on paper because it's written up as "Robert Minnick advised so and so, Robert Minnick advised so and so", and there's no—nothing of anything to go along with it especially a signature and it states in one of the Mississippi law books that if one person does not freely and voluntarily give a statement to an official it is completely inadmissible—

Q Mr. Minnick, you're saying that you didn't even give the statement. Which is it? Did you give the statement or did you not give the statement?

A No comment. I stand on the Fifth.

Q The truth of the matter is Mr. Denham at no time made any promises to you, did he?

A Hold on now. I'm not on trial here as of yet. This is for a motion.

Q Now, wait just a second, Mr. Minnick. I ask the questions. It's your duty to respond to the questions. You can answer the question. I'm not going to batter around questions and answers.

A That's fine. I stand on the Fifth.

Q The truth of the matter is you never told him at that interview that you wanted a lawyer, did you?

A Yes. I did. Very much so.

Q Now, Mr. Minnick, which is the truth? What you're saying now or what you said when your lawyer asked you questions, because you never one time said that you told Denham that you wanted a lawyer. Are you lying now or are—

A I'm saying right now—

BY MR. GATES: I object to the form of that question.

A The reason that I did not—

BY THE COURT: Wait just a minute. Overruled. Go ahead.

A The reason I did not sign any waiver of rights is specifically I wanted a lawyer and it's already down on the stenographer's paper here.

Q You never told that to Denham, did you?

A I don't comprehend the question. I stand on the Fifth.

Q In fact, Mr. Minnick, you thought that just simply because you refused to sign the waiver that nothing could be used against you and you just went out and confessed to the whole crime.

A I stand on the Fifth. As of here now—

Q Did you go to the doctor for all the injuries that Denham caused you after you left the interview room?

A I never said that Denham caused me any physical injuries, never at one time did I state that. And, yes, as arriving at the prison I did seek medical attention for my back problems being physically hurt by several of the police.

Q You weren't scared of Denham, were you?

A I stand on the Fifth. That's an illogical question. Anything else that you have to say I'm going to stand on the Fifth, Mr. D.A.

Q You decided you don't want to testify now—

A I stand on the Fifth.

Q Now, Mr. Minnick, the truth of the matter is that Denham never made any promises, did he?

A I stand on the Fifth.

Q The truth of the matter is that Denham never hurt you in any way, did he?

A I stand on the Fifth.

Q The truth of the matter is Denham informed you of your rights and you understood your rights.

A I stand on the Fifth.

Q The truth of the matter is that after informing you of your rights you said, "I refuse to sign anything, but I'll talk to you."

A I stand on the Fifth.

Q The truth of the matter is you explained how you escaped and how you and Dyess committed the murders of Lafferty and Ellis Thomas.

A I stand on the Fifth.

Q The truth of the matter is that at no time in that interview did you ask for a lawyer.

A I stand on the Fifth.

Q You're not scared of Denham, are you?

A I stand on the Fifth.

Q The truth of the matter is after that you waived extradition and signed a waiver of extradition, didn't you?

A I stand on the Fifth.

Q I now hand you a waiver of extradition and ask you if you waived extradition.

A That's already been stated on the stenographer's paper. I stand on the Fifth.

Q Is this a copy where you signed and waived extradition?

A I stand on the Fifth.

Q And, didn't you have an attorney at that time?

A I stand on the Fifth.

Q And, Denham didn't make you sign this, did he?

A He wasn't even there. I stand on the Fifth.

BY MR. WRIGHT: If it please the Court, the State moves to have this made the next numbered exhibit.

BY THE COURT: Next lettered exhibit?

BY MR. WRIGHT: Next numbered exhibit.

BY THE COURT: All right.

(ITEM WAS RECEIVED AND MARKED AS EXHIBIT 5, INTO EVIDENCE, AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE ____ AND MADE A PART OF THIS RECORD.)

Q The truth of the matter is Mr. Denham didn't ever tell you to go along and get some help, did he?

A I stand on the Fifth.

BY MR. WRIGHT: No further questions.

(WITNESS EXCUSED)

BY MR. GATES: I don't have any other witnesses.

BY MR. WRIGHT: The State recalls Mr. J. C. Denham.

Excerpt from Trial Transcript (Testimony *in limine* of Deputy Sheriff J.C. Denham) (Tr. 338-39)

J.C. DENHAM

called as a witness by the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. WRIGHT:

Q Mr. Denham, did you ever make any promises to the defendant, Minnick, to encourage him to make a statement?

A No, sir.

Q Did you ever tell him to go along—if he goes along that you might be able to help him turn out for him in court?

A No, sir.

Q Did you ever make a direct threat to him?

A No, sir.

Q Or, indirect threat to him?

A No, sir.

Q At any time did he ever ask for a lawyer during that interview?

A No, sir.

Q Did he give you the statement, basically, you said on direct and the substance of what your notes reflect pertaining to the murder?

A Yes, sir.

BY MR. WRIGHT: No further questions.

BY THE COURT: Did any of the people in California that you talked with say that the defendant wanted an attorney or advised that he would have an attorney?

A They advised that he would have an attorney with him during the extradition period whenever one would be needed.

BY THE COURT: All right.

CROSS EXAMINATION BY MR. GATES:

Q Do you know whether or not an attorney had been appointed for him?

A No. I don't.

BY MR. GATES: I believe that's all.

BY MR. WRIGHT: State rests.

(WITNESS EXCUSED).

BY MR. WRIGHT: Your Honor, the officer that Mr. Gates wanted is here—to call to the stand. Do you know his name?

BY MR. GATES: Kenneth Cross, I think.

BY THE COURT: All right. When you examine him I will rule on this motion to suppress statement made by your client Robert Minnick.

Excerpt from Trial Transcript (Trial Testimony of Deputy Sheriff J.C. Denham) (Tr. 929-40; 945-46)

* * *

Denham—direct

Q All right. At that period of time did you ask for any additional assistance in New Orleans?

Q What occurred in August?

A Received information from the San Diego County Sheriff's Department of their arrest of Robert S. Minnick.

Q What did you then do?

A I then traveled to San Diego, California where I talked with Mr. Minnick and he was arrested on the 22nd of August. I interviewed him on August the 25th.

Q And, based on your information did you perfect the arrest on August the 22nd?

A Yes, sir.

Q Who made the actual arrest in San Diego, California?

A The sheriff's deputies out there.

Q How long did it take you to get from Clarke County to California?

A I was notified the 22nd and I arrived out there late on the 24th.

Q Did you see Mr. Minnick in San Diego?

A Yes, sir.

Q On what day?

A August the 25th.

Q Where did you see him?

A At the San Diego County Jail.

Q Was he incarcerated?

A Yes, sir.

Q And, whereabouts in jail did you see him?

A In a plain viewing room inside the jail.

Q Do you see the same Robert Minnick here in this court room?

A Yes, sir.

Q Would you point him out?

A To my right. The first one at the table to my right.

Q What color shirt does he have on?

A Blue denim jacket shirt.

BY MR. WRIGHT: Let the record reflect he identified the defendant in the presence of the jury.

Q Now, Mr. Denham, when you saw Mr. Minnick what did you do?

A First I advised him of his rights.

Q I now hand you two exhibits of 2/3/87, Exhibit 2 and Exhibit 3. I'm going to back up. At the time you first saw Mr. Minnick had you had any contact with the FBI in San Diego?

A No, sir.

Q When you contacted Mr. Minnick what type of room were you in?

A Interview room with glass around the top portion of the room.

Q Was anybody else present?

A No, sir.

Q Would you describe the condition of Mr. Minnick at that time?

A He was able to talk to me and understand—you know—what I wanted to talk to him about.

Q Did you inform him of his rights?

A Yes, sir.

Q Would you demonstrate exactly how you informed him of his rights to the jury?

A It's a form I read to the person, and I can read the form.

Q Do you have that form?

A Yes, sir.

Q Do you have the exact form you used on that day?

A Yes, sir.

Q What exhibit number is that?

A Exhibit 2.

Q You can use that to refresh your memory.

A Okay, this is a form reading from the form, "Before we ask you any questions you must understand your rights. You

have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." He refused to sign the rights form. He advised me though that he would talk to me about what happened.

Q Did he state whether or not he understood his rights?

A Yes, sir. He did.

Q And, did you document that on your form?

A Yes, sir.

BY MR. WRIGHT: Please the Court, the State moves to have that admitted as the next numbered exhibit.

BY THE COURT: If there's no objection let it be marked Exhibit 39 and made evidence.

BY MR. GATES: We renew our previous objection to the alleged statement.

BY THE COURT: Sustained. You can't just sit there. I know you are able lawyers, both of you. I don't see how you can expect me to read your minds.

BY MR. WRIGHT: Then, the State requests that it be marked for identification only.

BY THE COURT: That's the status of it. It will be marked Exhibit O for identification only.

(ITEM WAS RECEIVED AND MARKED EXHIBIT O FOR IDENTIFICATION ONLY, AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE E-101, AND MADE A PART OF THIS RECORD.)

Q Now, Deputy Denham, once you informed him of his rights what did Mr. Minnick say?

BY MR. GATES: Again, I renew my previous objection, Your Honor.

BY THE COURT: Overruled.

A To begin with I asked him how they got out of our jail. He then told me how that took place.

Q What did Mr. Minnick say?

A He said that on Friday night, which was April the 25th, they waited until after the supper meal was served and when the trash was going to be collected out of the cell, when the guy came back to take it out they held the door to where it would appear that it was locked when he locked it and after he pulled the trash out and pushed the door back and turned the key, he held it where it couldn't lock. Upon the guy leaving out of the jail back there he and Dyess then left, went through the fire escape door and over the fence.

Q Now, at this point in time did you ask him any other questions?

A Concerning the jail I asked him if anyone else was involved in their escape and he said no.

Q And, did he tell you who escaped with him?

A James Dyess.

Q Did you question him further?

A Yes sir. I asked him what happened after they got outside of the jail that they—he then told me they left outside of Quitman, got into a wooded area and went south toward DeSoto, this being an area that James Dyess was familiar with.

Q Did he say how long it took them to get down into the DeSoto Community?

A He didn't say how long a time.

Q In relationship to Quitman, where on this map—where is Quitman on the map?

A Here—

Q Speak up.

A Here in the center of the map.

Q And, show me where the DeSoto Community is on the map.

A About five miles directly south on Highway 45 south of Quitman.

Q Did you continue to ask him any questions?

A Yes, sir. He stated after they went into the woods they traveled along and came upon a turkey hunter the following morning. After talking with the turkey hunter a few minutes they then continued on and came to a clearing where they had seen a trailer out in an open field.

Q Did he tell you what day this was?

A It would be the following day, the 26th.

Q All right. Did he continue to tell you what happened?

A Yes, sir. He said when Dyess seen the trailer he told him there would be some guns in the trailer. At that time they went to the trailer and went inside of it. He said once they got inside the trailer they found some guns and started collecting the guns up when they heard a vehicle drive up and he saw two men and a small child get out of the vehicle. He said the two men and the child stayed outside in the yard a few minutes and then they started coming toward the trailer and then Dyess and he jumped outside and at that time Dyess shot one of the men in the back with a shotgun.

Q Now, who told you that Dyess shot one of the men in the back with a shotgun?

A Robert Minnick.

Q Did he continue to tell you what happened?

A Yes, sir. He said then that Dyess went to the man and shot him in the head with a pistol. He then came back to where he was, gave him the pistol and told him to shoot the other man.

Q What did he say he did?

A Minnick then said that Dyess was holding a gun on him and he then shot the other man with a pistol two times.

Q Did he tell you what type of gun that he was saying that Dyess was holding on him?

A A small caliber—he said Dyess was holding a shotgun on him.

Q Did he tell you what type of gun he used to shoot the other man?

A A small caliber pistol.

Q Did he tell you what he then did?

A Yes, sir. He said that after both of the people had been shot they put the two year old child on the sofa in the trailer and at that time a vehicle drove up with two girls in it. He said he brought the two girls into the trailer and tied them up. He said while he was tying them up Dyess was telling—or it was all he could do to keep Dyess from trying to rape or hurt the girls.

Q Did he state who drug the bodies to the gully?

A He said Dyess drug them back to the gully.

Q What else did he say concerning the inside of the trailer and the two girls?

A He said after he tied up the two girls they collected up the weapons inside the trailer and then went outside and left in the silver pickup truck.

Q Now, while on the inside of the house how long did he say he was on the inside of the house with the two girls?

A Just a few minutes.

Q Did he state what they did then?

A He stated after leaving in the vehicle they then went to New Orleans. Upon reaching New Orleans they contacted—Dyess got in touch with a friend of his that he had known down there some years and at that time they sold some guns that came from the trailer to this man.

Q Now, directing your attention to the trailer did Mr. Minnick state anything concerning money?

A He said that approximately a hundred and twenty-one dollars was taken from the bodies of Thomas and Lafferty.

Q Did he state to you how long it took to get to New Orleans?

A No, sir.

Q And, when they arrived there tell me exactly what he said happened in New Orleans.

A He said once they arrived in New Orleans Dyess went and met the guy that he had known previously there and they sold some weapons that belonged to Thomas and Lafferty to this man.

Q Did he state where they stayed?

A He said they stayed for a period of time at the Sky Light Motel there in New Orleans.

Q Now, concerning the .22 caliber pistol did you ask him any questions concerning that pistol?

A Yes, sir. I asked him what happened to the pistol and he indicated to me that he threw it in the trash there in New Orleans.

Q Did he tell you anything else?

A He said after they stayed in New Orleans for a period of time they then caught a bus to Brownsville, Texas, then crossed the border over to Matamoros, Mexico.

Q Did you continue to ask him where they went?

A Yes, sir. I asked him what happened there and he said they stayed in Mexico a couple of days until he and Dyess got into a fight. He said he was able to get away from him at that time and then hitchhiked to California.

Q Did he state what Dyess had done to him there in Mexico?

A Yes, sir. He said he beat him and almost tried to kill him and that's when he escaped from Dyess.

Q And, concerning after Mexico did ne tell you where he went?

A: He said after leaving Mexico he hitchhiked to California and met some friends of his he had known out there previously. After meeting these friends he changed his name, got a different birth certificate and drivers license.

Q And, what name was he using?

A: David Prokaska.

Q Did you talk to him any more there in San Diego on August 25th, 1986?

A: No, sir.

Q Now, during this period of time what kind of condition was Mr. Minnick in during the interview?

A: He was able to understand and answer questions as I was asking them to him.

Q And, was he able to communicate with you?

A: Yes, sir.

Q Did you have any weapon on?

A: No, sir.

Q Did you threaten him or harm him in any way?

A: No, sir.

Q Did that conclude your interview?

A: Yes, sir. It did.

Q Did you see Mr. Minnick again in San Diego, California?

A: Yes, sir. Later during that week he was brought back by myself and another deputy to Mississippi.

Q And, did he waive formal extradition to come back to Mississippi?

A: Yes, sir.

Q And, who brought him back to Mississippi?

A: Myself and Deputy Robert Owen.

Denham - cross (Jury out)

Q And, have you also made memoranda of the alleged conversation between you and Robert Minnick that occurred in California?

A: Yes, sir.

Q Have you also previously testified to the substance of that conversation in pre-trial motion hearings?

A: Yes, sir.

Q Isn't it a fact that you did not fully state exactly the same thing as was in your previous testimony concerning the alleged statement of Robert Minnick to you in California?

A: I did not read the statement word for word. No, sir, I didn't.

Q Isn't it a fact that in the alleged previous statement there was more said about James Dyess as far as holding the gun to Robert Minnick's head?

A: I indicated earlier that Dyess held a shotgun to Minnick and made Minnick shoot the other man.

Q And, the previous testimony and memoranda does that reflect that Dyess said he would shoot Robert Minnick if he didn't do it?

A: I believe it does.

Excerpt from Trial Transcript (Refused Jury Instruction dated April 9, 1987) (Tr. 1233)

IN THE CIRCUIT COURT OF
LOWNDES COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS

ROBERT S. MINNICK

INSTRUCTION NO. ____
[blank in original]

The Court instructs the jury that in considering the evidence pertaining to the alleged statement allegedly given by Robert Minnick to James Denham, you may consider whether or not he gave a voluntary statement. If you do not find from the evidence beyond a reasonable doubt that Robert Minnick gave a voluntary statement to James Denham, you may not consider the alleged statement as evidence.

objection sustained
refused *[handwritten notations in original]*

Excerpt from Trial Transcript (Order entering conviction for capital murder and death sentence dated April 9, 1987) (Tr. 1260)

The jury has found you guilty of the crime of capital murder in Counts I-II and has sentenced you to death, and the Court accepts the sentence of the jury and it is therefore the sentence of this Court that you be transported to the Mississippi State Penitentiary at Parchman, Mississippi and that you suffer death by lethal injection in the form and manner prescribed by law and that further said execution be carried out on the 23 day of May, 1987.

/s/ L. F. WILLIAMSON
Circuit Judge
L. F. Williamson

Excerpt from Brief for Appellee State of Mississippi (page 3) on petitioner's direct appeal to the Supreme Court of Mississippi dated April 29, 1988

* * *

There is no doubt that Minnick's Fifth Amendment right to counsel had attached at the point of the interview with Deputy Denham. *Edwards* v. *Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1328 (1981). It is also evident that under Mississippi law, Minnick's Sixth Amendment right to counsel had attached at the time of the interview since warrants for his arrest had been issued. *Livingston* v. *State*, 519 So. 2d 1218 (Miss. 1988).

* * *

Opinion of the Supreme Court of Mississippi affirming petitioner's conviction and sentence dated December 14, 1988

Robert S. MINNICK

v.

STATE of Mississippi

No. DP-79.

Supreme Court of Mississippi

Dec. 14, 1988.

En Banc

DAN M. LEE, Presiding Justice, for the Court:

On September 9, 1986, Robert S. Minnick was indicted by the Grand Jury of Clarke County, Mississippi, for two counts of capital murder, one for the murder of Lamar Lafferty while engaged in the crime of robbery, and the other for the murder of Donald Ellis Thomas while engaged in the crime of robbery. Minnick was also indicted as an habitual offender on both counts. Motion for change of venue was granted, and a bifurcated jury trial was held in Lowndes County on April 6, 7, 8 and 9, 1987. The jury returned a verdict of guilty as charged on both counts; after a sentencing hearing, the jury imposed the death sentence. Minnick appeals his conviction and sentence, assigning numerous errors. We affirm.

FACTS

On April 26, 1986, around 3:30 p.m. Deputy Sheriff Johnny Hopson, Clarke County, arrived at the mobile home of Donald Ellis Thomas (Ellis) in response to a call from the Jasper County Sheriff's office. He observed a puddle of blood, a hat and some mail strewn across the yard. He also observed two young girls in the presence of a Jasper County Sheriff's deputy, Marty Thomas and Desiree (B.B.) Beech. He noticed drag marks starting at the east end of the mobile

home that led across the back yard of the mobile home, which he followed to the edge of a gully running behind the mobile home. In the gully he found two bodies. At this point, he secured the premises and called Chief Investigator of the Clarke County Sheriff's Department, J.C. Denham.

Upon being called to investigate, Denham proceeded to interview Marty Thomas, Ellis Thomas' younger sister, and B.B. Beach. Marty and B.B. drove over to Ellis' mobile home between 2:00 and 2:30 on April 26, to play in the gully. Marty drove her older sister's red car. As they drove up the driveway, a white man met them. Marty described him as short, skinny, with a shaved head, blue shirt, tennis shoes, two rotten front teeth, and carrying a pistol. The man told her to hand him the keys, get out of the car, and do as he said if they wanted to live. He marched them both to the back of the trailer, where they saw Ellis' truck, a big black man, and a body lying on the ground. Marty recognized the body as Lamar Lafferty. The black man carried a rifle or a shotgun. The white man took them inside the trailer through the back door, where they saw Brandon Lafferty, Lamar's two-year old son, sitting on the couch. The white man made them lie on the floor in the den, on their stomachs, as he tied their hands and feet behind their backs with haystring. The black man came inside and began carrying guns out of the bedroom. The white man told them four or five times to tell the police that it was two black men or he'd come back and kill them. The white man then got a pitcher of tea from the refrigerator, while the black man continued to carry out guns. Then they left. Marty and B.B. cut through the haystring around their feet with their fingernails and found a knife from the kitchen to cut their hands loose. Looking out the window, they saw no one there, and saw that Ellis' truck was gone. They took Brandon, got in their car, and went to a friend's house, where Marty called the police. The Jasper County Sheriff's Office responded first; Marty told them that two black guys had tied them up. The Jasper County deputy sheriff determined that the incident occurred in Clarke County and called the Clarke County Sheriff's Department. He then took the girls with him to the mobile home and were

met by Deputy Hopson. Marty again told Hopson that two black guys had tied them up. The girls were taken to their Uncle Marlin's house where Deputy Denham came to talk to them. When Marty found out that Ellis and Lamar were dead, she told Deputy Denham the truth—that a white man and a black man had tied them up. Upon taking Marty's and B.B.'s statements, Denham realized that the description of the two men fit the description of two escapees from Clarke County Jail, Robert Minnick and James "Monkey" Dyess, who escaped from the jail the evening before.

Denham was also able to interview Thaddis Pryor, who was turkey hunting on the morning of April 26 around the Beaver Dam community in Clarke County where his deer camp is located. On Sunday morning, April 27, having heard about the incident at the Thomas mobile home, Pryor contacted the Clarke County Sheriff's Department and related that he saw a white man and a black man on an oil lease road on foot. He approached the two men because he thought they were poachers on his camp property. He described the white man as short, skinny, pale, with a shaved head and two rotten front teeth. The black man was around six feet tall, 190 pounds, muscular build, with a short Afro. He talked to the two men for about ten minutes. Denham then met with Pryor who took him to the area where he had met Minnick and Dyess while turkey hunting. Denham was able to observe a boot print and a tennis shoe print in the area. Pryor's descriptions matched the ones given by the girls, as well as the descriptions of the two jail escapees.

The investigation pinpointed three shotguns, three rifles, a pistol, and ammunition that were taken from the trailer by Minnick and Dyess, as well as Thomas' silver Ford pickup truck. Several days after the incident, Lafferty's wallet and Thomas' checkbook were found lying along the road several miles from the Thomas trailer. Furthermore, time of the incident was established as occurring after 1:00 p.m. on April 26. Lamar Lafferty's father ate lunch with his son and then saw Lamar and Lamar's son, Brandon, leave with Ellis in Ellis' truck around 1:00 p.m. Also, Greg Thomas, Ellis' cousin and closest neighbor, heard gunshots coming from Ellis' mobile

home about 2:30 p.m. Thirty seconds later he heard another sound like a muffled shot or dud firecracker, and five minutes after that he heard two more shots which sounded like they came from a small-calibre gun. Shortly thereafter, he saw Marty and B.B. drive by in a red car.

The Medical Examiner's report indicated that Thomas suffered a close contact gunshot wound to the middle of the forehead and a second wound on the right lower back from a distance of approximately 15 feet. Lafferty suffered two gunshot wounds to the head, both close contact wounds from a small-calibre gun. The Medical Examiner's opinion was that both men were alive when their wounds were inflicted and died within a few minutes.

Denham entered the information concerning the missing guns and missing silver Ford pickup truck into the computer on the NCIC network. The truck was recovered in Florida on May 6, 1986. Apparently, the truck had been stolen from New Orleans by Paul Stanley Ward because when the truck was recovered, they found parking tickets from New Orleans under the seat. (Ward was convicted in Clarke County for possession of a stolen truck.) Denham then requested assistance from the New Orleans Police Department; however, they were not able to locate Minnick or Dyess.

On August 22, 1986, Denham received information from the San Diego Police that they had arrested Minnick. Denham flew out, arriving late August 24. He interviewed Minnick on August 25. He first advised Minnick of his rights, but Minnick refused to sign a waiver of rights form. Minnick agreed to tell him about his and Dyess' escape from Clarke County jail, but Minnick then proceeded to tell him about events after the escape. According to Minnick as told to Deputy Denham, he and Dyess walked outside of Quitman south toward DeSoto in a wooded area. They came upon a turkey hunter and talked to him early the next morning, then continued on until they came to a clearing where the Thomas mobile home was located. They decided to go into the trailer to find guns. As they were collecting the guns, a vehicle drove up with two men and a small child in it. Dyess jumped out of the mobile home and shot one of the men in the back

with a shotgun, and then shot him in the head with a pistol. Dyess handed Minnick the pistol and told him to shoot the other man. Dyess held a shotgun on Minnick until he did so. They then put the child on the sofa in the mobile home, after which the two girls drove up. They tied the girls up in the mobile home. Minnick stated that he talked Dyess out of raping or hurting the girls. Dyess dragged the bodies of the two men into the gully. They left with $121 in cash, the guns, and the silver pickup truck. They drove to New Orleans where they sold the weapons and threw the pistol in the trash. They left New Orleans on a bus to Brownsville, Texas, and then crossed the border into Mexico. Minnick and Dyess got into a fight—Dyess beat him and tried to kill him—so Minnick hitchhiked to California where he changed his name, procuring a birth certificate and a drivers license in the name of David Prokaska.

Minnick waived extradition and Denham brought him back to Mississippi to stand trial. Before trial commenced, the state was able to recover two of the guns stolen from the Thomas mobile home through the FBI in New Orleans.

LEGAL DISCUSSION

I. GUILT PHASE

A. Minnick's Alleged Statement to Denham Should Have Been Suppressed.

At pretrial hearing on motions, Minnick presented a written motion to suppress the statement allegedly given by him to Deputy Denham in San Diego, California, on August 25, 1986. That motion asserted that the statements were not voluntary and that Minnick made no knowing and intelligent waiver of his right to counsel, and that he had requested assistance of counsel.

At the hearing on the motion to suppress, both Denham and Minnick testified. Also, Minnick introduced a report of an interview of Minnick by the FBI on August 23, 1986. The FBI report shows that Minnick was advised of his rights and

that he refused to sign a waiver form. Minnick answered some questions, but then ceased to answer, saying, "Come back Monday when I have a lawyer." The FBI interviewers honored his request and ceased interrogation.

Deputy Denham testified that when he interviewed Minnick, he first read Minnick his *Miranda* rights, but Minnick refused to sign a waiver form. Denham then asked Minnick if he wanted to talk about what happened. Minnick replied, "It's been a long time since I've seen you." Then Denham asked Minnick to tell about his escape from Clarke County Jail. Minnick agreed to do that much, and then, according to Denham, just proceeded to confess to the murders. Denham left the interview and wrote up his notes concerning what Minnick said. Minnick refused to sign Denham's handwritten account of their interview. Minnick later waived extradition, and Denham brought him back to Mississippi.

Minnick also testified at the suppression hearing that he was arrested in Lemon Grove, California, by local police on August 22, beat up and carried to San Diego County Jail where he was put in a holding cell. He claimed he was not read his rights until the FBI interviewed him. He refused to talk with the FBI without an attorney.

After the FBI interview, but before Denham arrived to interview him, Minnick stated that he spoke to an attorney who told him not to speak to anyone else about any of the charges against him. When Denham arrived at the jail, the jailers told Minnick that he would have to go down and talk to Denham. Denham read him his rights again, and Minnick refused to sign the waiver form. Minnick agreed to tell him about the escape from Clarke County Jail, and that is all he agreed to tell him. However, when questioned further about what he told Denham about the robbery and killings, Minnick refused to testify further, invoking his Fifth Amendment right against self-incrimination.

Minnick's motion to suppress the statements was overruled by the trial judge, who found that Minnick had knowingly and intelligently waived his rights. Denham could testify as to the confession, but his written notes could not be introduced

into evidence. Minnick renewed his motion to suppress at trial, which was again overruled.

On appeal, Minnick argues that the confession was taken in violation of his Fifth and Sixth Amendment rights to counsel.

1. *Fifth Amendment Right to Counsel.*

Minnick argues that, under *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), Denham's initiation of the interview on Monday, August 25, violated his Fifth Amendment right to counsel under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), since Minnick invoked his right to counsel under *Miranda* during the FBI interview on August 23.

In *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the United States Supreme Court held:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85, 101 S. Ct. at 1884-85. While it is true that Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him.[1] In this kind of situation, the

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1 Minnick's testimony on this point was as follows:

Q: Did you ever ask to stop talking to the FBI man?

A: As I was saying, they drilled me on several questions of the incident and I told them about leaving the jail and that's all I told them.

Edwards bright-line rule as to initiation does not apply. The key phrase in *Edwards* which applies here is "until counsel has been made available to him." *Id.* at 485, 101 S. Ct. at 1885. Since counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied. Therefore, this aspect of Minnick's argument is without merit.

2. *The Sixth Amendment Right to Counsel.*

Minnick argues further that his Sixth Amendment right to counsel under Mississippi law had attached by the time of the Denham interview since warrants for his arrest had issued; the state does not dispute this. *See, e.g., Livingston* v. *State*, 519 So. 2d 1218, 1221 (Miss. 1988). The state, however, argues that Minnick knowingly and intelligently waived his right to counsel when he gave the statements to Denham. In *Cannaday* v. *State*, 455 So. 2d 713 (Miss. 1984), this Court stated:

> However, the Sixth Amendment right to counsel has broader ramifications [than the right to counsel under *Miranda*]. The accused's right to counsel, once that right has attached, is a broad guarantee that the accused "need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 1932, 18 L. Ed. 2d 1149 (1967).

I told them I had to have a lawyer before I was able to make any statements about anything and I told them I was not signing any rights waiver or I was not signing anything because I had to have a lawyer to talk with before I could talk to any law official.

Q: What was your lawyer that you talked to—name?

A: I don't recall his name.

Q: How long did you talk to him?

A: I talked to him two different times and—it might have been three different times—but I talked to him the day he told me the next day he would get the court order. He told me that first day that he was my lawyer and that he was appointed to me and to not talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police—I advised him of the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department.

Id. at 722. *Cannaday* went on to say, "once this right has attached in a criminal case interrogation may not commence without the express waiver by the defendant of the right to counsel," citing *Massiah* v. *United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). *Id. See also Page* v. *State*, 495 So. 2d 436, 440 (Miss. 1986). The precise question before us, then, is whether or not Minnick expressly waived his Sixth Amendment right to counsel when he spoke with Denham.

The standard for determining whether or not a defendant has waived his Sixth Amendment right to counsel was set out in *Brewer* v. *Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). The proper standard to be applied in determining the question of waiver as a matter of constitutional law is "that it [is] incumbent upon the state to prove 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* at 404, 97 S. Ct. at 1242. The right to counsel "does not depend upon a request by the defendant" and "courts indulge in every reasonable presumption against waiver." *Id.* But the *Brewer* opinion makes clear that a defendant can, without notice to counsel, waive his Sixth Amendment right to counsel. *Id.* at 405, 97 S. Ct. at 1242.

Applying this standard to Minnick's situation, the record supports the trial judge's finding that Minnick knew he had the right to counsel as evidenced by the fact that he had previously invoked it. There is also evidence from the record—from Minnick's own testimony at the suppression hearing—that he spoke to an attorney before Denham interviewed him, and that the attorney told him not to talk to anyone.

Denham, by Minnick's own account, warned Minnick again that he need not speak to him in the absence of coun-

sel. Minnick then testified, however, that he refused to sign a waiver of rights form, apparently believing that a waiver of rights form must be signed for any waiver to be valid. The U.S. Supreme Court has rejected this "*per se* rule" argument in *North Carolina* v. *Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), when it stated:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver.

Id. at 373, 99 S. Ct. at 1757. The *Butler* opinion went on to point out that while courts must presume that a defendant did not waive his rights, "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.*

Minnick, again by his own admission, did not tell Denham he wished to have a lawyer present before he spoke to Denham. Minnick replied to Denham's request to talk about what happened by saying, "It's been a long time since I've seen you," after which the two of them talked about various folks back in Mississippi. Denham then asked Minnick if he would at least talk about how he escaped from Clarke County Jail. By Minnick's own account, he agreed to speak with Denham about the escape—a conscious decision to talk about the escape in the absence of counsel.[2] From Minnick's

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2 Minnick testified at the suppression hearing on this point unequivocally:

> A: I give no direct statement of any kind concerning any murder charges or anything being on the run with Monkey Dyess, nothing that is on paper which I have read. Everything is put down, I advised this, I advised that, I advised this, I advised that. They have no signature and no coercing ears that can say that I give any sort of statement of any kind freely or voluntary to any police officer for anything. I refused and I deny anything put down on paper being that I said so and so, except and excluding the immediate

own words and actions, Minnick clearly relinquished his known right to counsel and responded to Denham's request.

From that point on, the evidence indicates, from Denham's testimony, that Minnick continued, freely and voluntarily, to talk about events after the jail escape. This evidence went virtually unrebutted because Minnick, when questioned about whether or not he voluntarily continued to talk about events after the jail escape, refused to testify further, invoking his Fifth Amendment right against self-incrimination.[3]

> escape from the county jail, which I will state I fully to the best of my knowledge I did escape from the county jail. They have me dead to rights on that and there is no way around it . . . .

3 On cross-examination on this point, Minnick responded:

> Q: Sit down and I'll ask you some questions. Now, Mr. Minnick, pertaining to your rights form, you know what the Miranda Rights are, don't you?
>
> A: That I had a right to remain silent and so on and so forth?
>
> Q: Yes.
>
> A: I have heard it spoke to me before on several occasions.
>
> • • • • • •
>
> Q: Deputy Denham did inform you of your rights, didn't he?
>
> A: I can't recall exactly what he said but he recited something he called rights to me and I was not able to read anything of rights waiver or any—you know—because he had no paperwork whatsoever.
>
> Q: You stated to him you refused to sign a waiver of rights but you were willing to talk to him, didn't you?
>
> A: Not exactly those words. I told him—well, actually it was nothing official at all and there weren't no statements official from him in any kind of way. We went through several different conversations about—first, about how everybody was back in the county jail and what everybody was doing, had he heard from Mama and had he went and talked to Mama and had he seen my brother, Tracy, and several different other questions pertaining to such things as that. And, we went off into how the escape went down at the county jail . . . .
>
> Q: And, then you got into what happened when Lafferty and Thomas were killed, didn't you?
>
> A: I have no comments on that and I stand on the Fifth Amendment.

Under this factual scenario, it is evident that Minnick was aware of his rights, had been advised by an attorney prior to the conversation with Denham, was aware that he did not have to make any statements or answer any questions, and that he made a conscious decision to relinquish his Sixth Amendment right to counsel. The trial judge so found, and under our often-articulated scope of review, this Court will not disturb a trial judge's findings at a suppression hearing unless manifestly in error, or contrary to the overwhelming weight of the evidence. *See Merrill* v. *State*, 482 So. 2d 1147, 1151 (Miss. 1986); *Frost* v. *State*, 483 So. 2d 1345, 1350 (Miss. 1986); *Wiley* v. *State*, 465 So. 2d 318, 320 (Miss. 1985); *Neal* v. *State*, 451 So. 2d 743, 756 (Miss. 1984).

In so holding, we note that had Minnick at any point during his interview with Denham elected to have assistance of counsel before speaking further, the waiver would have immediately been dissolved. *See Patterson* v. *Illinois*, 487 U.S. 285, ____, 108 S. Ct. 2389, 2395, 101 L. Ed. 2d 261, 272 (1988), n.5. However, there is no evidence on the record that Minnick made any such request during Denham's interview. Therefore, we find no error in the lower court admitting the testimony as to Minnick's oral confession at trial. This assignment of error is without merit.

B. The Court Erred in Overruling Minnick's Motion to Prohibit "Death Qualification" of Jury Prior to Guilt Phase.

Minnick filed a motion to prohibit "death qualification" prior to the guilt phase, which was overruled at pre-trial hearing on motions. Minnick argues that the defendant is prejudiced by being required to voir dire the jury on their feelings about the death penalty because jurors who could not vote to impose the death penalty are excluded, resulting in an unfair cross section of the community. In *Cole* v. *State*, 525 So. 2d 365, 374 (Miss. 1987), this Court rejected this argument, as has the United States Supreme Court in *Lockhart* v. *McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). This assignment, therefore, is without error.

C. The Court Erred in Improperly Instructing the Jury as to Burden of Proof.

At the end of the first day of trial, the trial judge gave the jury instructions as to their sequestration—that they must stay together, not talk to anyone about the case, not watch tv, not read the newspapers, etc. He summed up by reminding the jury that their "decision must be based upon and controlled by the greater believable evidence in this courtroom and nowhere else." Minnick complains that the judge stated the wrong burden of proof. The distinction, however, is that the judge was not formally instructing the jury on the law, but rather on their conduct while being sequestered. Minnick makes no showing that this isolated remark prejudiced the jury. He made no contemporaneous objection to the remark, and cites no authority for his proposition. Therefore, this Court need not consider this assignment of error. *May* v. *State*, 524 So. 2d 957, 967 (Miss. 1988); *Ramseur* v. *State*, 368 So. 2d 842 (Miss. 1979).

D. The Court Erred in Allowing Testimony of Marlon Lafferty.

The state offered the testimony of Marlon Lafferty, Lamar's father. The first time the state advised Minnick that it planned to use Lafferty as a witness was the first day of trial, the day before Lafferty was offered as a witness, in violation of Rule 4.06, Unif. Crim. R. Cir. C. Prac. Minnick cites *Box* v. *State*, 437 So. 2d 19 (Miss. 1983), for the proposition that Lafferty's testimony should have been excluded. The guidelines set out in the concurrence in *Box* (Robertson, J.), 437 So. 2d at 22, have been applied by this Court in subsequent cases. *See, e.g., Shaw* v. *State*, 521 So. 2d 1278 (Miss. 1987); *Cole* v. *State*, 525 So. 2d 365, 367 (Miss. 1987); *Griffin* v. *State*, 504 So. 2d 186, 195 (Miss. 1987). Under the *Box* procedure, defense counsel must first make timely objection, to which the trial court should respond by giving defense counsel a reasonable opportunity to interview the witness. *Box*, 437 So. 2d at 23. In the instant case, Minnick's counsel objected and the trial court allowed him a recess to

interview Lafferty. If after the interview the defendant thinks he has been subjected to unfair surprise and that he will be prejudiced by the evidence, the defendant must move for a continuance. *Id.* Minnick's counsel did not move for a continuance, but merely renewed his objection, which the trial court overruled. Since the defendant did not move for a continuance, the trial court did not err in admitting the evidence. Furthermore, Minnick was not prejudiced by the testimony. Lafferty's testimony was brief and concise on one issue—establishing that his son and Thomas were killed sometime after 1:00 p.m., since he had seen them both at lunchtime. Therefore, this assignment of error is without merit.

E. The Court Erred in Failing to Sustain the Defense Challenge for Cause for Juror No. 28.

Minnick contends that Juror No. 28, Kenny Vickery, should have been stricken for cause because Vickery stated during voir dire that in order for him not to impose the death penalty, Minnick would have to prove beyond a reasonable doubt that he should not be executed. The court overruled the challenge for cause as to Vickery; defense counsel then used his twelfth peremptory challenge to remove Vickery. However, defense counsel made no more challenges for cause and requested no more peremptory challenges.

This Court has held that "the general rule is that failure to excuse for cause is error when appellant has exhausted his peremptory challenges." *Billiot* v. *State*, 454 So. 2d 445, 457 (Miss. 1984). *See also Johnson* v. *State*, 512 So. 2d 1246, 1255 (Miss. 1987); *Gilliard* v. *State*, 428 So. 2d 576, 580 (Miss. 1983); *Rush* v. *State*, 278 So. 2d 456, 458 (Miss. 1973); *Chapman* v. *Carlson*, 240 So. 2d 263, 268 (Miss. 1970). *Billiot* went on to say, "Appellant did not thereafter ask for any more challenges either for cause or peremptory. Therefore, there was no reversible error." *Billiot*, 454 So. 2d at 457. Since defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause, or ask for a more peremptory challenges, this assignment of error is without merit.

F. The Court Erred in Admitting Photos of the Dead Bodies.

Before trial, Minnick made a motion to prohibit the introduction of photos of the dead bodies on the grounds of irrelevancy and prejudice. The lower court reserved ruling until trial, at which time the motion was overruled. The state argued at pre-trial hearing that it wished to use the photos to establish *corpus delicti*.

This Court recently, in *Boyd* v. *State*, 523 So. 2d 1037 (Miss. 1988), stated, "If photographs are relevant, the mere fact that they are unpleasant or gruesome is no bar to their admission into evidence." *Id.* at 1040. Furthermore, *Boyd* went on to state that the admission of photographs is within the sound discretion of the trial judge and his decision will be upheld by this Court unless there is an abuse of discretion. *Id.* Under M.R.E. 403, the trial judge may exclude relevant evidence if its probative value is outweighed by its prejudicial effect. The photos admitted in the instant case were not particularly gruesome, though they were realistic; they were few in number; they tended to corroborate the investigative officers' testimony about where and how the bodies were found. They also tended to illustrate the medical examiner's testimony as to cause of death. The trial judge did not abuse his discretion in allowing the photographs into evidence. *See, e.g., Williams* v. *State*, 544 So. 2d 782 (Miss. 1987); *Alford* v. *State*, 508 So. 2d 1039, 1041 (Miss. 1987); *Johnson* v. *State*, 476 So. 2d 1195, 1206 (Miss. 1985). Therefore, this assignment of error is without merit.

G. The Court Erred in Not Granting a Continuance Based on the Untimely Disclosure of the Blymier Evidence by the State.

Ten days before trial, the state informed Minnick's counsel that they had uncovered a material witness, James Blymier, who would testify that he bought two guns from Dyess and Minnick in New Orleans in May of 1986 (the guns were identified by serial number as two of the guns taken from the Thomas mobile home), and would identify Minnick in court. Blymier would also testify that he previously knew Dyess as

one of his employees. The state became aware of this witness only the day before it notified defense counsel. Minnick filed a motion for continuance in order that defense counsel could interview Blymier. The trial judge denied the motion for continuance, but did state that as soon as Blymier was available in Mississippi, the state was to allow defense counsel an opportunity to interview him. Blymier showed up the day he was to testify, and the lower court gave defense counsel a recess during trial to interview Blymier. After the interview, Minnick made a motion to suppress the Blymier testimony, at which time Blymier testified out of the presence of the jury. Minnick again moved for a continuance. The trial judge overruled both motions, allowing Blymier to testify.

The state does not dispute that Minnick's motion for continuance was properly brought before the trial court, as set out in *Gates* v. *State*, 484 So. 2d 1002, 1006 (Miss. 1986), and Miss. Code Ann. § 99-15-29 (1972). Minnick alleges that the trial court abused its discretion by not allowing a continuance in order for him to interview Blymier. The granting or denial of a continuance is within the sound discretion of the trial judge. *Gates*, 484 So. 2d at 1006; *King* v. *State*, 251 Miss. 161, 168 So. 2d 637, 641 (1964). The *Gates* opinion speaks to the issue of a continuance when a witness is unavailable. The present case is distinguishable in that Blymier was made available, albeit in New Orleans, to Minnick's counsel ten days before trial. Minnick's counsel was given as much time as he wanted to interview Blymier before Blymier testified. The need for a continuance under these circumstances is spurious, and Minnick has not shown how he was prejudiced by not having more time than ten days to find and interview Blymier. He made no such showing in his motion for new trial, which *Gates*, 484 So. 2d at 1006, states must be shown. *See also Denton* v. *State*, 348 So. 2d 1031, 1033 (Miss. 1977) (again, dealing specifically with an unavailable witness). This Court has upheld a denial of a continuance where defense counsel has been given an opportunity to interview the witness before trial. *Speagle* v. *State*, 390 So. 2d 990, 991 (Miss. 1980). Therefore, this assignment of error is without merit.

H. The Court Erred in Refusing to Exclude the Blymier Evidence.

Minnick continues his allegation that, because the state did not disclose Blymier as a witness during original discovery, his testimony should have been excluded. The state does not dispute that there was a discovery order entered pursuant to Unif. Crim. R. Cir. Ct. Prac. 4.06. *See Morris* v. *State*, 436 So. 2d 1381, 1387 (Miss. 1983). The question then becomes whether or not the state violated Rule 4.06. As pointed out above, Minnick was aware of Blymier's potential testimony ten days prior to trial; Minnick received notice from the state about Blymier the day after the state uncovered him as a witness. Under these circumstances, it is hard to say that the state violated Rule 4.06. Furthermore, even if the situation could be characterized as one in which the state "failed" to produce discovery, "failure to make pretrial disclosure [does not] require *per se* reversal. We have recognized that non-discovered evidence *may* be admitted at trial if the party against whom that evidence is offered is given a reasonable opportunity to make adequate accommodation." *Henry* v. *State*, 484 So. 2d 1012, 1014 (Miss. 1986). *See also Foster* v. *State*, 484 So. 2d 1009 (Miss. 1986); *Jones* v. *State*, 481 So. 2d 798 (Miss. 1985); *Davis* v. *State*, 472 So. 2d 428 (Miss. 1985); *Cabello* v. *State*, 471 So. 2d 332 (Miss. 1985). Minnick had ten days to deal with Blymier's potential testimony. When Blymier appeared to testify, the trial judge called a recess and gave defense counsel as much time as he wanted to interview the witness. Therefore, the trial court did not abuse its discretion by allowing Blymier to testify. This assignment of error is without merit.

I. The Court Erred in Excluding the FBI-Stockwell Report.

Blymier testified that he bought the guns from Minnick and Dyess and turned them over to his store manager, Stockwell, for Stockwell to turn over to the FBI. FBI Special Agent Bryan Shields testified that he received the guns from Stockwell. Shields also stated that he made a memorandum of his interview with Stockwell which Minnick offered into

evidence to impeach Blymier's testimony; the state objected on hearsay grounds. Minnick then argued that the report falls into the catch-all exception, M.R.E. 804(b)(5), because Stockwell was not available to testify, even though a subpoena had been issued for him, and because the report had guaranties of trustworthiness since Stockwell made his statements to the FBI. The trial judge did not allow the report into evidence on the grounds that it was hearsay.

Stockwell's statement to the FBI as to how he came into possession of the guns did not tally with Blymier's testimony that he, Blymier, had bought the guns from Dyess and Minnick and turned them over to Stockwell. Stockwell's statement to the FBI indicates that he took the guns away from a man named Vincent Mendez, whom he saw take the guns from a black man in an alley behind Blymier's grocery store. Stockwell indicated that he brought them to the FBI when he learned that the guns had been implicated in a murder in New Orleans. Stockwell was shown a photo display of black men, including a picture of Monkey Dyess, to determine if he could positively identify the man who handed the guns to Mendez. Stockwell could not positively identify anyone.

The problem with the FBI report is that it is hearsay within hearsay. The report itself could probably be admitted under M.R.E. 803(6), Records of a Regularly Conducted Activity. The comments to Rule 803(6) indicate that law enforcement reports can be considered under this exception. However, Stockwell's statements are not excepted by 803(6), as the comment indicates:

> However, the source of the material must be an informant with knowledge who is acting within the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Stockwell's statements do not fit any 803 or 804 exception. The question becomes, then, whether the requirements of 804(b)(5) were met. The trial judge, while not making specific findings as to the admissibility of the evidence under a residual exception, found the Stockwell statements to be hearsay which did not fit any exception.

In *Cummins* v. *State*, 515 So. 2d 869 (Miss. 1987), this Court analyzed the requirements of the residual exceptions at length. Rule 804(b)(5) requires that the proponent of the hearsay statement must give notice to the party against whom the evidence is offered. Minnick candidly admits that no notice was given until the day of trial, but that Stockwell's statements came from the state's files in the first place, so that the state could not have been totally surprised by their being offered into evidence. As *Cummins* points out, "[g]reat latitude is usually allowed depending on the facts and circumstances of each case in the context in which the evidence arises." *Cummins*, 515 So. 2d at 873. The overriding concern, before a hearsay statement may be admitted under a residual exception, is that it has equivalent guarantees of trustworthiness similar to those of other exceptions. Minnick argues that because the statements are contained in an FBI report, they are trustworthy. The argument, however, goes to the report itself, and not to Stockwell's statements. Minnick did not offer at trial, nor here on appeal, any evidence that Stockwell's statements themselves were especially trustworthy. Considering the circumstances surrounding the retrieval of the guns, there is no outstanding reason to consider Stockwell's statements particularly trustworthy, as apparently the trial judge did not find them to be. As *Cummins* pointed out, "in the absence of a finding that the hearsay statements offered were sufficiently reliable, it [would be] error to admit them pursuant to the residual exceptions to the hearsay rule." *Cummins*, 515 So. 2d at 874.

The residual exception also requires that the statement be offered as evidence of a material fact. It can be argued that it was material to Minnick's alibi defense as to whether or not he could be tied in with the guns in New Orleans; however,

the next requirement, that the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable effort, weighs against admission. Minnick could have offered alibi evidence through other witnesses as to his whereabouts when these guns came into Stockwell's or Blymier's possession, and could have achieved the same result as Stockwell's statements could have achieved. Minnick made no attempt at trial to offer any such evidence. As *Cummins* states, "this requirement raised an issue of fact as to whether or not [the proponent] used reasonable efforts to procure live testimony. . . . Absent such a finding the evidence cannot be admitted under the residual exception to the hearsay rule." *Cummins*, 515 So. 2d at 874.

Minnick did not successfully demonstrate at trial that Stockwell's statements met the requirements of 804(b)(5), and the trial judge correctly excluded the statements from evidence. Minnick makes no better argument here on appeal. Therefore, this assignment of error is without merit.

J. The Court Erred in Admitting the Guns.

The two guns obtained through the FBI from Blymier/Stockwell, were admitted into evidence through the testimony of FBI agent Linda Lee, who had custody of the guns before trial. The guns had previously been identified as those belonging to Donald Ellis Thomas through serial number checks. Minnick objected to their being admitted on the grounds that chain of custody of the evidence had been broken because Stockwell was not available to testify. However, FBI Agent Bryan Shields did testify that he received the guns from Stockwell. From the time the FBI received the guns until they were admitted at trial, the chain of custody was established. In *Gibson* v. *State*, 503 So. 2d 230, 234 (Miss. 1987), this Court reiterated that the test for continuous possession of evidence is whether or not there is any indication of probable tampering with or substitution of evidence. "Any question as to the chain of possession is within the sound discretion of the trial judge, and, absent abuse resulting in prejudice to the defendant, his decision will stand on appeal." *Id.* There is no indication that the evidence was tampered with in the present case; indeed, there is no allegation by Minnick to that effect. Furthermore, in *Evans* v. *State*, 499 So. 2d 781, 783 (Miss. 1986), this Court stated:

> Physical objects which are relevant and for which the chain of custody is not broken or which are otherwise identified with certainty are admissible into evidence. [cites omitted] Matters regarding the chain of custody of evidence are largely within the discretion of the trial court, and absent an abuse of discretion, this Court will not reverse. [cites omitted] However, the confrontation clause of the Sixth Amendment is restricted to witnesses, and does not include physical evidence. *United States* v. *Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976); *G.E.G.* v. *State*, 389 So. 2d 325, 326 (Fla. Dist. Ct. App. 1980); *State* v. *Armstrong*, 363 So. 2d 38, 39 (Fla. Dist. Ct. App. 1978).

The chain of custody was not broken; the guns had been otherwise identified with certainty; no confrontation clause considerations arise. Therefore, the trial court correctly admitted the guns into evidence. This assignment of error is without merit.

K. The Court Erred in Mentioning that Defense Counsel was Appointed.

At the very beginning of the trial, the trial judge introduced Minnick's attorneys by saying:

> And, the defendant is represented by Mr. Gates from Meridian. He's associated and I have appointed an attorney from Columbus, but I'm sorry, I can't recall your name.

Minnick cites *Sanders* v. *State*, 429 So. 2d 245, 252 (Miss. 1983), wherein this Court, in unequivocal terms, condemned the practice of defense counsel introducing themselves as court-appointed attorneys. However, in *Compton* v. *State*,

460 So. 2d 847 (Miss. 1984), this Court, while reiterating the point that neither judges nor attorneys should introduce counsel as court-appointed, held that such a remark did not constitute reversible error in that case. *Id.* at 848. The remark, though not particularly commendable, does not amount to reversible error in this case. This assignment of error is without merit.

L. The Court Erred in Not Suppressing In-Court Identification by Blymier, Thomas, Beech and Prior.

Minnick makes the argument that the pre-trial identification procedures were suggestive and that the in-court identifications were not sufficiently reliable. The "*Wade* trilogy" and its progeny are the guidelines this Court must follow in determining the competency of identification testimony. *York* v. *State*, 413 So. 2d 1372, 1374 (Miss. 1982). *York* is the leading case in Mississippi on this issue and has been followed by this Court on numerous occasions. *See, e.g., Davis* v. *State*, 510 So. 2d 794 (Miss. 1987); *White* v. *State*, 507 So. 2d 98 (Miss. 1987); *Jones* v. *State*, 504 So. 2d 1196 (Miss. 1987); *Smith* v. *State*, 492 So. 2d 260 (Miss. 1986). As pointed out in *York*, there are two lines of analysis when considering pre-trial identifications: the Fourteenth Amendment due process analysis and the Sixth Amendment right to counsel analysis. Minnick raises only the issue that the pre-trial identification photographic displays were suggestive. He does not specify, however, how any of the photographs were suggestive.

At the pre-trial hearing on Minnick's motion to suppress any identification from the photographs or any in-court identification, the evidence showed that Marty Thomas and Desiree Beech, who were tied up in Donald Ellis Thomas' mobile home, picked out Minnick and Dyess from a photo lineup after they had given a description of their assailant—pale, short, skinny, with a shaved head—to the deputy sheriff. Both testified that they could easily identify Minnick in court from their own independent knowledge of what the man who tied them up looked like, and there was no suggestion that

anyone had told them who to pick from this lineup. Both girls identified photographs of Minnick at trial as well as identifying him in court.

Since there is no allegation that the photo display shown to the girls was suggestive, the trial court did not err in allowing either the evidence of their out-of-court identification of Minnick or their in-court identification of him. As stated in *York*, 413 So. 2d at 1383, "[o]nly pretrial identifications which are suggestive, without necessity for conducting them in such manner, are proscribed."

Thaddis Pryor, who was turkey hunting and stopped and talked to a white man and a black man walking down a road in rural Clarke County on the morning of the murder, gave a description of these two men to the deputy sheriff on the day after the incident. Pryor was not shown any pictures at that time. At trial, Pryor identified photographs of Minnick and Dyess as the same two men he talked to on the morning of April 26. He also identified Minnick in court. Since Pryor did not participate in any pre-trial identification procedures, his in-court identification could not have been tainted by any suggestive pre-trial procedures, and the trial court did not err in allowing him to testify as to Minnick's identity.

As to Blymier's identification of Minnick, there is a question of suggestiveness, since it seems from the record that the district attorney simply took a photograph of Minnick to New Orleans with him and showed it to Blymier. *See Manson* v. *Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). However, there is only fleeting reference to this procedure in the record, and defense counsel did not develop it on the record or here on appeal. The trial judge heard Blymier's testimony out of the presence of the jury in a short suppression hearing during trial, and found that there would be no substantial likelihood of irreparable misidentification in allowing him to identify Minnick in court, since Blymier was able to describe Minnick accurately from seeing him in New Orleans. We cannot say that the trial judge was in error. Even an impermissibly suggestive pre-trial identification does not preclude in-court identification by an eye-witness who viewed the suspect at the procedure "unless: 1) from the

totality of the circumstances surrounding it, 2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of a misidentification." *York* at 1383, citing *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), and *Simmons* v. *U.S.*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). *York*, citing *Neil* v. *Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), goes on to set out the factors to consider in determining whether this standard has been met:

1. Opportunity of the witness to view the accused at the time of the crime;
2. The degree of attention exhibited by the witness;
3. The accuracy of the witness's prior description of the criminal;
4. The level of certainty exhibited by the witness at the confrontation;
5. The length of time between the crime and the confrontation.

York, 413 So. 2d at 1383; *Neil*, 409 U.S. at 199, 93 S. Ct. at 382. *See also Ray* v. *State*, 503 So. 2d 222, 223 (Miss. 1987). Applying these factors to Blymier's identification of Minnick in court, Blymier stated that he was able to identify Minnick in court, not because of the photograph he had seen earlier, but because he had seen Minnick in the alley by his store when Minnick and Dyess sold him the guns. He described Minnick as short, skinny, pale, and with a shaved head, a description which fit Minnick at the time he would have been in New Orleans with the guns. While there was very little testimony developed about Blymier's level of certainty of identification when he first saw the picture of Minnick and none as to the length of time between the sale of the guns to Blymier and his identifying Minnick's photograph, there was also nothing to contradict the accuracy of Blymier's identification. Under the totality of the circumstances, we cannot say that there was a very substantial likelihood of misidentification. Therefore, this assignment of error is without merit.

M. The Court Erred in Excluding Certain Testimony Pertaining to Paul Stanley Ward.

The defense called as a witness Polly Covington, the attorney for Paul Stanley Ward. She testified that Ward pled guilty and was convicted in Clarke County, Mississippi, of possession of Donald Ellis Thomas' stolen truck. Ward was found in Florida with the truck. Defense counsel then asked Mrs. Covington what conversations she had with Ward concerning how he came into possession of Thomas' truck. The state objected to Mrs. Covington being allowed to answer the question because her answer would be hearsay. The trial court sustained the objection. Proffer of the testimony was made, as follows:

Q: What, if any, conversation did you have with Paul Stanley Ward concerning whether he stole the truck of Donald Ellis Thomas?

A: I would assert the attorney/client privilege pursuant to Count IV of the Code's professional responsibility and will follow the Rules of Evidence as to anything except what is in the public record or I have access to in the public record.

Q: What, if any, conversations did you have with Paul Stanley Ward concerning whether or not he had any involvement in the death of Lamar Lafferty and Donald Ellis Thomas?

A: There again, I would assert the attorney/client privilege to any conversations I had with him. That would not be evidence from the public record.

The proffer also showed that Ward waived indictment and pled guilty to grand larceny, stating he had stolen the truck from the streets of New Orleans and had driven it to Florida.

Minnick argues that he should have been allowed to get this testimony before the jury even though Mrs. Covington asserted the attorney/client privilege. He analogizes this situation to that of *Stewart* v. *State*, 355 So. 2d 94 (Miss. 1978), where this Court discussed the right of a defendant to call a

witness who, it was obvious from the other evidence, would refuse to answer questions based on his Fifth Amendment right against self-incrimination. This Court held it was reversible error for the trial court to exclude that witness in that case because the witness could have answered some questions to which the Fifth Amendment privilege did not apply. This Court recognized, however, that there was a split of authority on the issue.

In *United States* v. *Roberts*, 503 F.2d 598 (9th Cir. 1975), speaking of a witness who asserted his Fifth Amendment right not to incriminate himself, the Ninth Circuit stated:

> The Sixth Amendment right to call a witness must be considered in the light of its purpose, namely to produce testimony for the defendant. [cite omitted] Calling a witness who will refuse to testify does not fulfill the purpose. . . .

Id. at 600. *See also United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975); *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973).

Assuming the attorney/client privilege is analogous to the Fifth Amendment privilege against self-incrimination, the trial court did not reversibly err by not allowing Mrs. Covington to get on the stand and assert the attorney/client privilege. Nothing could be gained by the defendant having her so testify. The attorney/client privilege aside, anything Ward would have have said to her about how he came into possession of the truck would have been hearsay, anyway. For these two reasons, then, this assignment of error is without merit.

N. The Prosecutor Made Improper Closing Argument.

Minnick asserts that in closing argument at guilt phase, the state's attorney appealed to the jury's emotions with an argument calculated to inflame them. Specifically, he objects to:

(1) The state's attorney arguing that the two deceased victims "testified" through the state medical examiner.

This argument was objected to by defense counsel and overruled.

(2) The states's argument that the jury should do justice for the people of Clarke County.

No objection was made at trial to this line of argument.

(3) The prosecution's rebuttal argument stated he was mad that defense counsel had the audacity to suggest the possibility that the eyewitness testimony of the two little girls could be unreliable.

No objection was made to this argument at trial.

(4) The DA's characterization of Minnick's confession statement that Dyess forced him to shoot one of the victims as an excuse, and that Minnick was the only one identified with the pistol.

This argument was objected to at trial, which the trial court sustained to some extent by telling the jury that it was to find facts from the evidence, and not based on what counsel says. The DA continued this line of argument, to which defense counsel again objected; the objection was sustained.

(5) The DA, in rebuttal, argued that the people are the law and the people must enforce the law.

Defense counsel objected, which objection was sustained; defense counsel then moved for mistrial, which was denied.

The state first argues that as to those statements made by the prosecutor to which no contemporaneous objection was made, the error, if any, is waived, citing *Cole* v. *State*, 525 So. 2d 365 (Miss. 1987), wherein this Court stated: "If no contemporaneous objection is made, the error, if any, is waived. This rule's applicability is not diminished in a capital case." *Id.* at 369. *See* cases cited therein. This procedural bar would apply to allegations (2) and (3) above. The state argues that the other comments must be taken as a whole, and as such, they fall into the wide latitude permitted in final argument, citing *Griffin* v. *State*, 504 So. 2d 186 (Miss. 1987). In *Griffin* this Court stated: "Both sides are afforded wide lati-

tude in their final arguments to the jury so long as they do not argue some impermissible factor." *Id.* at 194. *See also Neal* v. *State*, 451 So. 2d 743, 762 (Miss. 1984). Two of the prosecutor's statements which could be characterized as impermissible, that Minnick was the only one identified with the pistol, which the evidence did not concretely support, and that the people are the law and the people must enforce the law, were objected to and the objections sustained by the trial court. The trial court additionally instructed the jury that it must find the facts, and not rely on what the prosecutor says the facts are. These two objectionable statements were cured by the trial judge.

Taken as a whole, all of these statements fall into the permissible latitude afforded attorneys in closing argument. As this Court stated in *Johnson* v. *State*, 416 So. 2d 383, 391 (Miss. 1982), quoting *Nelms and Blum Company* v. *Fink*, 159 Miss. 372, 382, 131 So. 817, 820 (1930):

> Counsel was not required to be logical in argument; he is not required to draw sound conclusions, or to have a perfect argument measured by logical and rhetorical rules; his function is to draw conclusions and inferences from evidence on behalf of his client in whatever he deems proper, so long as he does not become abusive and go outside the confines of the record.

Minnick was not impermissibly prejudiced by the prosecutor's remarks and, therefore, this assignment of error is without merit.

II. PENALTY PHASE

A. The Court Erred in Overruling Minnick's Motion for Supplemental Voir Dire of the Jury at the Penalty Phase.

Pre-trial, Minnick filed a motion for separate *voir dire* of the jury at penalty phase, which was overruled. This motion was filed in conjunction with his motion that the jurors should not be "death qualified" as discussed. On appeal,

Minnick actually argues that a separate jury should have been empaneled to hear the evidence at penalty phase.

This argument has been rejected by this Court on numerous occasions. *See, e.g.*, *Johnson* v. *State*, 476 So. 2d 1195, 1202 (Miss. 1985); *Jones* v. *State*, 461 So. 2d 686, 692 (Miss. 1984); *Billiot* v. *State*, 454 So. 2d 445, 455 (Miss. 1984); *Culberson* v. *State*, 379 So. 2d 499, 508 (Miss. 1980); *Jackson* v. *State*, 337 So. 2d 1242, 1256 (Miss. 1976). In *Jackson* this Court indicated that the preferred practice was to keep the same jury for both phases of the trial if practical and barring any unforeseen circumstances. *Jackson*, 337 So. 2d at 1256. In *Johnson* and *Billiot*, this Court pointed out that such practice was provided for in Miss. Code Ann. § 99-19-101 (Cumm. Supp. 1987) and that such practice is constitutional. *Billiot*, 454 So. 2d at 456; *Johnson*, 476 So. 2d at 1202. Therefore, this assignment of error is without merit.

B. The Court Erred in Excluding the FBI-Stockwell Report at Sentencing Phase.

This assignment of error as to guilt phase was discussed above. Minnick puts forth no new arguments as to the exclusion of the report at penalty phase. Therefore, the previous discussion applies here, as well. This assignment of error is without merit.

C. The Court Erred in Failing to Grant a Cautionary Instruction as Requested by Defense Counsel.

At the end of the guilt phase, defense counsel asked for a cautionary instruction to the effect that on three occasions there were serious emotional outbursts by members of the victims' families. Minnick wanted the jury instructed to discount any emotional outbursts during deliberation. The instruction was denied. This argument is tied to Minnick's earlier argument that a new jury should have been empaneled before sentencing phase because during guilt phase, several members of the victims' families testified. Minnick characterizes the testimony and the emotional outbursts as tantamount to victim impact evidence which was prohibited in *Booth* v.

Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). Alternatively, he argues that under *Fuselier* v. *State*, 468 So. 2d 45 (Miss. 1985), the emotional outbursts prejudiced Minnick to the point that the jury returned the death penalty based on emotion and sympathy for the victims' families, amounting to an arbitrary imposition of the death penalty.

It is true that several members of the victims' families testified; however, they all testified as to facts relevant and pertinent to the issues in the case. None of these witnesses testified about any emotional impact the death of their loved ones had on them.

Clearly, *Booth* does not apply to this kind of testimony. The *Booth* decision dealt with a Maryland statutory provision that a prepared Victim Impact Statement (VIS) outlining the emotional impact on the family and outlining the family's characterization of the crime, should be introduced into evidence at penalty phase. Such evidence was held by the Booth court to violate the Eighth Amendment. Absolutely nothing of the kind of evidence prohibited by *Booth* was before the jury in the present case.

As to the analysis under *Fuselier*, there was no situation in the present case as there was in *Fuselier*, where a member of the victim's family sat with the prosecutor inside the rail, facing the jury, consulting with the prosecutor, and displaying emotion. There is no specific indication in the present record when these alleged emotional outbursts occurred, or that they at any point interrupted the proceedings.

Based on the record, there was no emotionalism displayed that rises to the level as discussed in *Fuselier*. The trial judge apparently did not believe there was a serious problem, and from the record there is no basis to say that he was in error by denying the request for a cautionary instruction. Furthermore, the jury was adequately instructed on numerous occasions that it must determine sentence based only on the law and the evidence. This assignment of error is without merit.

D. The Court Erred in Refusing Instruction D-3-Sentencing Phase.

Minnick requested the following jury instruction, which was refused:

> The Court instructs the jury that if you have any whimsical doubt then that is a mitigating circumstance.

In refusing the instruction, the trial court told defense counsel that he could argue whimsical or residual doubt to the jury if he chose, which defense counsel did. Minnick cites *Smith* v. *Wainwright*, 741 F.2d 1248 (11th Cir. 1984), as support for his proposition. While that case acknowledges that a "whimsical doubt" might inure to the benefit of a defendant, the opinion does not say that the jury needs to be instructed on whimsical doubt as a mitigating factor. In fact, this discussion was in the context of the court considering an ineffective assistance of counsel claim and, tangentially, the ramifications of a single jury sitting for both phases of a capital trial. In a later Fifth Circuit case, *Johnson* v. *Thigpen*, 806 F.2d 1243 (5th Cir. 1986), the Fifth Circuit again considered whimsical doubt in terms of such being a beneficial by-product of the same jury sitting for both phases of the trial. *Id.* at 1251. That discussion was in the context of what limitations may be imposed on defense counsel's argument so as not to impair the jury's consideration of residual doubt. No discussion of a jury instruction appears in this opinion.

In the recent case of *Franklin* v. *Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988), the United States Supreme Court addressed the issue of whether or not the Eighth Amendment requires that the jury be instructed as to residual doubt as a mitigating factor. In a plurality opinion (the two concurring justices did not disagree on this issue, but voiced some concern over Texas's sentencing procedure), the Supreme Court pointed out that none of its previous opinions held that there is a constitutional right to such an instruction in mitigation, pointing out that residual doubt does not go to the issue of defendant's character, record, or circumstances of the offense, but only to doubt about defen-

dant's guilt which is not, in the strictest sense, a mitigating factor. *Franklin*, 487 U.S. at ____, 108 S. Ct. at 2327, 101 L. Ed. 2d at 166. The opinion focuses on the idea that where a defendant argues residual doubt to the jury, which a defendant is free to do to a relevant extent, the defendant's right to have a jury consider residual doubt is not impaired by the trial court rejecting an instruction on residual doubt. *Franklin*, 487 U.S. at ____, 108 S. Ct. at 2328, 101 L. Ed. 2d at 167.

Since Minnick's counsel was able to argue whimsical doubt to the jury, the jury's consideration of whimsical doubt was not impaired by the trial court's denial of a jury instruction on whimsical doubt. Therefore, this assignment of error is without merit.

E. The Court Erred in Excluding the Prison Record of Paul Stanley Ward at Sentencing Phase.

Defense counsel offered the prison record of Ward at sentencing phase because the records reflect that Ward escaped from the custody of the Mississippi Department of Corrections on November 7, 1986. Apparently, Minnick's argument is that Ward's flight from custody is a fact from which guilt can be inferred, citing *Fuselier* v. *State*, 468 So. 2d 45, 57 (Miss. 1985). It is not clear from either the record or from appellant's brief what crime Ward was supposedly fleeing when he escaped from prison. In this regard, Minnick's reliance on *Fuselier* is totally misplaced; the flight instruction in *Fuselier* was held to be improperly given because flight from the murder scene could have been probative of guilt of two to crimes—murder and escaping from prison. *Id.* at 57.

The trial court correctly excluded Ward's prison records on the basis that they were totally irrelevant to any mitigating factor. Nevertheless, Minnick further argues that the Ward prison records could have gone to whimsical doubt. Again, as discussed above, the trial judge can exclude, as irrelevant, mitigation evidence not bearing on defendant's character, record or circumstances of the crime. Therefore, this assignment of error is without merit.

F. The Court Erred in Excluding Evidence Pertaining to James Dyess at Penalty Phase.

As with the Ward prison record, Minnick also offered in mitigation the prison record of James "Monkey" Dyess to show that Minnick was under the domination of Dyess. The trial judge found the prison records to be irrelevant and not germane to the issue of Dyess' domination of Minnick. While it is true that the defendant has a right to place before the jury any mitigating evidence as to the circumstances of the crime, as well as his character, *see, e.g.*, *McCleskey* v. *Kemp*, 481 U.S. 279, ____, 107 S. Ct. 1756, 1773, 95 L. Ed. 2d 262, 286 (1987), *Skipper* v. *South Carolina*, 476 U.S. 1, 8, 106 S. Ct. 1669, 1673, 90 L. Ed. 2d 1 (1986), *Cole* v. *State*, 525 So. 2d 365, 371 (Miss. 1987), it is clear that the evidence must be relevant to one or more of those factors. While evidence that Minnick's character was such that he could be easily dominated by a stronger personality might be relevant, or evidence that in the circumstances of this offense Minnick was dominated by someone else, there is no indication or reason to believe that the prison records of James Dyess would demonstrate either of those factors. Furthermore, the focus of mitigation evidence is that of the defendant's character, record, etc., so that individualized consideration of sentencing may be engaged in by the jury. *See McCleskey*, 481 U.S. at ____, 107 S. Ct. at 1773, 95 L. Ed. 2d at 262. Dyess' prison records do nothing to focus on Minnick's character or the circumstances of this crime. Therefore, the trial judge correctly excluded the Dyess prison records from evidence at sentencing phase. This assignment of error is without merit.

G. The Court Erred in Admitting Records of Conviction.

Minnick's records of prior convictions from both California and Mississippi were introduced at penalty phase over objection by defense counsel on the basis of lack of foundation by proper custodian. Minnick admits, however, that the records were certified. The California records are a summary of the court records certified by the trial judge where Minnick was committed and sentenced for assault with a deadly

weapon. This Court has approved admitting these kinds of records as proof of a prior conviction. *See DeBussi* v. *State*, 453 So. 2d 1030, 1031 (Miss. 1984); *Lovelace* v. *State*, 410 So. 2d 876, 878 (Miss. 1982). The Mississippi record was a certified copy of the judgment of conviction where Minnick pled guilty to a robbery charge and was sentenced to eight years (the sentence Minnick was serving when he escaped from the Clarke County Jail). This Court has regularly upheld proof of prior convictions made by certified copies of judgments of conviction. *See DeBussi*, 453 So. 2d at 1031 and cases cited therein.

Minnick raises on appeal a different objection to these records—that there is not proof that the Robert S. Minnick on the records was the same Robert S. Minnick on trial. Aside from the problem that Minnick is barred from raising this issue on different grounds from his objection below, *Livingston* v. *State*, 525 So. 2d 1300, 1303 (Miss. 1988), the state elicited testimony from Deputy Sheriff Denham that he had personally retrieved these records of prior conviction for the district attorney and knew that Robert S. Minnick was one and the same at trial as in those records. Denham also supervised Clarke County Jail and knew Minnick to be the same one sentenced for robbery as represented by the Mississippi records. This testimony went unrebutted at trial. Therefore, this assignment of error is without merit.

H. Aggravating Circumstances.

1. *Stacking.*

Minnick filed a motion to prohibit the state from using as aggravating factors that the crime was committed during the course of a robbery and that the crime was committed for pecuniary gain. The argument is the familiar "stacking" argument that the state can elevate murder to felony murder and then, using the same circumstances, can elevate the crime to capital murder with two aggravating circumstances. As pointed out in *Lockett* v. *State*, 517 So. 2d 1317, 1337 (Miss. 1987), this Court has consistently rejected this argument. *See also Jone* v. *State*, 517 So. 2d 1295, 1300 (Miss. 1987); *Wiley*

v. *State*, 484 So. 2d 339, 351 (Miss. 1986). The United States Supreme Court, in *Lowenfield* v. *Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), held that the fact that the sole aggravating circumstance found by the jury in its penalty decision was identical to an element of the underlying offense did not violate the Eighth Amendment. *Lowenfield*, 484 U.S. at ____, 108 S. Ct. at 555, 98 L. Ed. 2d at 583. This assignment of error is without merit.

2. *"Especially Heinous, Atrocious or Cruel."*

Two identical jury instructions, SS-5 and SS-6, were submitted, one for the killing of Thomas and one for the killing of Lafferty, in which six aggravating circumstances were outlined which the jury could consider. One of the aggravating circumstances was the "especially heinous, atrocious or cruel" aggravating circumstances set out in Miss. Code Ann. § 99-19-101 (Cumm. Supp. 1987). Minnick argues that the jury was not properly instructed as to this aggravating circumstance so that it narrows the class of convicted murderers who may receive the death penalty—in other words, the aggravating circumstance is unconstitutionally vague. He directs this Court's attention to the recent United States Supreme Court case of *Maynard* v. *Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), as controlling this issue. In *Maynard*, the United States Supreme Court held the "especially heinous, atrocious or cruel" aggravating factor to be unconstitutionally vague and violative of the Eighth Amendment where the jury was not given a limiting instruction. However, the sentencing jury in the present case was given a limiting instruction as to the meaning of "especially heinous, atrocious or cruel." Therefore, in this case, the "especially heinous, atrocious or cruel" aggravating circumstance, with the limiting instruction, was not unconstitutionally vague, as contemplated by the *Maynard* decision. This assignment of error is without merit.

I. The Court Erred in Instructing the Jury to Make a Finding as to Whether or Not Minnick Intended that a Killing Take Place and as to Whether or Not Minnick Contemplated that Lethal Force Be Used.

Minnick argues that the evidence was insufficient to support the two findings that the jury made that Minnick intended that a killing take place or that he intended that lethal force be used. The jury was instructed, as to each victim, that it should make findings as set out in Miss. Code Ann. § 99-19-101(7) (Cumm. Supp. 1987) as to whether or not:

> (a) the defendant actually killed, (b) the defendant attempted to kill, (c) the defendant intended that a killing take place, (d) the defendant contemplated that lethal force be used.

Minnick first argues under the Weathersby Rule, *Weathersby* v. *State*, 165 Miss. 207, 147 So. 481 (1933), which states that "where the defendant is the only eyewitness to a homicide, his version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Id.* at 209, 147 So. at 482. *See also Jordan* v. *State*, 513 So. 2d 574, 579 (Miss. 1987); *Alford* v. *State*, 508 So. 2d 1039, 1041 (Miss. 1987); *Wetz* v. *State*, 503 So. 2d 803, 808 (Miss. 1987). Minnick contends that the only evidence of the actual killings came from his alleged confession, and that his version of what happened must be accepted as true. Minnick's reliance on the *Weathersby* Rule is totally misplaced in the context of the jury's findings under our death penalty sentencing statute. The *Weathersby* Rule is applicable only in the context of whether or not the defendant killed with malice or intent; in other words, is there sufficient evidence to prove that defendant killed with malice or intent where his version of the incident as the only eyewitness, says otherwise. *See Wetz*, 503 So. 2d at 808. Where the trial on a capital offense has reached the sentencing phase, defendant's guilt has been

found and *Weathersby* considerations are no longer applicable.

Minnick further argues that under *Enmund* v. *Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (which is still controlling in Mississippi by virtue of the required statutory findings the jury must make, rather than the recent standard of "culpable mental state of reckless disregard for human life" set out in *Tison* v. *Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 [1987]), there is insufficient evidence to support these two jury findings. This Court faced a similar argument in *Leatherwood* v. *State*, 435 So. 2d 645, 655 (Miss. 1983), where the defendant argued under *Enmund* that the death penalty could not be imposed upon a "non-trigger man" unless there is proof that the defendant killed, attempted to kill, or intended to kill the victim. *Id.* at 656. This Court found that the Leatherwood situation did not fall within *Enmund*'s holding—Enmund did not participate in the actual robbery nor was he present when the murder was committed, while Leatherwood participated in the robbery and was present when the murder was committed. *Id.* The present case likewise does not fall within *Enmund*'s holding, since Minnick actually participated in the robbery and was present in some role while both murders were committed, such that the jury could reasonably find that Minnick intended the killings and intended that lethal force be used.

This assignment of error is without merit.

J. The Prosecutor Made Improper Closing Argument

This argument is a continuation of the argument Minnick made under the guilt phase. Specifically, Minnick objects to the following comments made by the prosecutor at closing argument of the penalty phase:

> 1. That the death penalty preserves life because it deters crime.

No objection was made to this comment.

2. That robbery is proved.

Objection was made and overruled.

3. That the defendant wants mercy. What mercy did these two men get?

This comment was not objected to.

4. That any other verdict would be a charade to justice.

Objection was made and overruled.

5. That Minnick has had three fair trials (for two murders and robbery).

No objection was made to this comment.

6. That the only way to control Robert S. Minnick is to sentence him to death.

No objection was made to this comment.

7. That Minnick went to New Orleans to sell the guns.

No objection was made to this comment.

8. Where was the leniency for Thomas Lafferty and their families? If you have a tear to shed, shed it for these two individuals.

No objection was made to this comment.

The state, of course, argues that as to those comments for which no objection was made, procedural bar applies. *See Cole* v. *State*, 525 So. 2d 365, 369 (Miss. 1987). Procedural bar would apply to comments (1), (3), (5), (6), (7), and (8). Comment (2) was a statement summarizing the evidence—that there is evidence to prove robbery, which the jury already decided since it returned a guilty verdict. Comment (4) could be characterized as a rhetorical statement to persuade the jury to return a death penalty.

Aside from the procedural bar, the comments taken as a whole do not argue an impermissible factor or go outside the

record. They seem to fall within the wide latitude afforded counsel in closing argument, as discussed earlier in this opinion. Therefore, this assignment of error is without merit.

K. Ineffective Assistance of Counsel.

Minnick alleges that he was denied his Sixth Amendment right to counsel at penalty phase because his attorney committed unprofessional errors sufficient to effect [*sic*] the outcome of the penalty phase. It is interesting to note that Minnick is represented on appeal by the same attorney who represented him at trial (in essence, the attorney is claiming his own ineffectiveness). In any event, Minnick alleges specifically that

1. No mercy instruction was tendered.
2. No objections were made by defense counsel to improper argument by the district attorney.
3. Defense counsel failed to object to two aggravating circumstances which did not fit Minnick's case.

Minnick does not specifically allege whether or not these omissions would have changed the outcome of the sentencing phase.

The applicable test is *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which this Court has applied on numerous occasions. *See, e.g., Byrd* v. *State*, 522 So. 2d 756, 760 (Miss. 1988); *Reynolds* v. *State*, 521 So. 2d 914, 918 (Miss. 1988); *Carney* v. *State*, 525 So. 2d 776, 780 (Miss. 1988); *Cabello* v. *State*, 524 So. 2d 313, 315 (Miss. 1988); *Wiley* v. *State*, 517 So. 2d 1373, 1382 (Miss. 1987); *Merritt* v. *State*, 517 So. 2d 517, 520 (Miss. 1987); *Faraga* v. *State*, 514 So. 2d 295, 308 (Miss. 1987). The *Strickland* test is two-pronged: first, the defendant must show that counsel's performance was deficient. As stated in *Faraga*, 514 So. 2d at 306, "counsel's conduct, viewed as of the time of the actions taken, must have fallen outside of a wide range of reasonable professional assistance." On the record as a whole, Minnick's counsel was diligent, tenacious, persistent, and conscientious in his defense of Minnick. These three omissions cannot fairly be characterized as incompetence. At

trial, it should be remembered that Minnick's confession had been admitted into evidence. By sentencing phase, the jury had already returned a verdict of guilty. Defense counsel effectively argued mercy to the jury in his closing argument; he also effectively argued that the evidence did not fit any of the aggravating circumstances. His closing argument took advantage of the wide latitude afforded attorneys in closing argument such as to counter-balance the wide latitude taken by the state in closing argument. In essence, these three omissions were counter-balanced by the attorney's closing argument such that the jury's consideration of any of these three ideas was not impaired.

The second prong of the *Strickland* test is that a defendant must show that the deficient performance was prejudicial. This prong requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. There is nothing in the record to suggest that these three omissions prejudiced Minnick to the point that there is a reasonable probability that the outcome would have been different. Minnick has not met either prong of the *Strickland* test and, therefore, this assignment of error is without merit.

CONCLUSION

Having reviewed the record as submitted from the Circuit Court of Lowndes County, Mississippi, we find no reversible error therein.

Pursuant to Miss. Code Ann. § 99-19-105(3)(a), (b), (c) and (5) (Cumm. Supp. 1987), and the decisions of both this Court and the Federal courts on the imposition of the death penalty, we have reviewed the record in this case and compared it to the death sentences imposed in the cases decided by this Court since *Jackson* v. *State*, 337 So. 2d 1242 (Miss. 1976), which cases are set forth in Appendix A. Having engaged in this comparison, we now hold that the punishment of death in this case is not too great when the aggravating and mitigating circumstances are weighed against each other, and we are satisfied that the death penalty will not be wantonly or freakishly imposed here.

We conclude that the death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supports the jury's finding of statutory aggravating circumstances under § 99-19-101 and that the sentence of death is not excessive or disproportionate to the penalty imposed in other cases, considering the defendant, a jailed habitual offender who escaped from jail, the crime, a double homicide, and the manner in which the crime was committed, in the course of a robbery to acquire money, a vehicle and guns, along with the kidnapping and tying up of two young girls; that the death penalty imposed upon Minnick is consistent with similar cases; and that the sentencing phase of the trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.

We affirm both the guilt phase and the sentencing phase of this trial and, therefore, affirm the conviction of Robert S. Minnick on charges of capital murder and the imposition of the death penalty. The date of Wednesday, January 18, 1989, is set as the date of execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED.

ROY NOBLE LEE, C.J., HAWKINS, P.J., and PRATHER, SULLIVAN, ANDERSON, GRIFFIN and ZUCCARO, JJ., concur.

ROBERTSON, J., dissenting with separate written opinion.

APPENDIX A

DEATH CASES AFFIRMED BY THIS COURT:

Nixon, Sr. v. *State*, 533 So. 2d 1078 (Miss. 1987)
Williams v. *State*, 544 So. 2d 782 (Miss. 1987)
Lockett v. *State*, 517 So. 2d 1317 (Miss. 1987)
Lockett v. *State*, 517 So. 2d 1346 (Miss. 1987)
Faraga v. *State*, 514 So. 2d 295 (Miss. 1987)
Cole v. *State*, 525 So. 2d 365 (Miss. 1987)
Jones v. *State*, 517 So. 2d 1295 (Miss. 1987)
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ROBERTSON, Justice, dissenting:

I.

We have a rule that seems to work well in civil cases. A lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present. At the very least he must give notice of his intentions to or obtain consent of opposing counsel. This rule is undergirded by an ethical principle.[4] All accept that a lawyer who approaches a represented third party without going through counsel should be severely sanctioned. And this is so though the lawyer uses a lay representative or paralegal to do his dirty work.[5]

Think what we would do in a personal injury case. The injured party is represented and has been engaged in settlement negotiations with the prospective defendant and his lawyer. Unbeknownst to plaintiff's lawyer, defense counsel's paralegal investigator approaches plaintiff and emerges with a settlement agreement for a sum substantially less than counsel had been demanding. Or, suppose the investigator obtained a(n oral) statement that compromises plaintiff's case.[6] We know well what would happen, the only point of mystery being whether defense counsel would be shot or flogged.

We regard this rule a fair one. Its genesis lies in our concern with fairness. That the third party has a lawyer is taken as an expression of his wish to be dealt with only through counsel. There is substantial probability of the party being

4 *See* Rule 4.2 of Mississippi Rules of Professional Conduct, effective July 1, 1987, entitled "Communication with person represented by counsel."

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

5 *See* Rule 5.3, Miss. R. Prof. Conduct.

6 *See Bruske* v. *Arnold*, 44 Ill. 2d 132, 254 N.E.2d 453, 455 (1969); *see also Trans-Cold Express Inc.* v. *Arrow Motor Transit, Inc.*, 440 F.2d 1216, 1219 (7th Cir. 1971).

overreached when his lawyer is not there. The integrity of the lawyer-client relationship is at stake.

I know of no basis for assuming that a prosecuting attorney is exempt from these rules. Indeed, the district attorney has a special responsibility for assuring that the accused has counsel and is not taken unfair advantage of.[7] We have recognized in a variety of contexts that the knowledge and conduct of law enforcement authorities are imputed to the prosecuting attorney as representative of the state. *See, e.g.*, *White* v. *State*, 498 So. 2d 368, 370 (Miss. 1986); *Foster* v. *State*, 484 So. 2d 1009, 1011 (Miss. 1986); *Fuselier* v. *State*, 468 So. 2d 45, 56 (Miss. (1985). By analogy, Deputy Sheriff Denham was the agent and alter ego of the district attorney when he went to San Diego to interview Minnick. *See People* v. *Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 422, 348 N.E.2d 894, 898 (1976).

If I understand the facts correctly, Minnick was taken into custody and placed in jail in San Diego, California, on August 22, 1986. He was interviewed by an FBI agent on August 23. At that time, according to the majority, "Minnick answered some questions, but then ceased to answer, saying, 'Come back Monday when I have a lawyer.' " After the FBI interview but before Deputy Denham arrived, a lawyer was furnished to Minnick, apparently a San Diego public defender, who, according to the majority, "told him not to speak to anyone else about any of the charges against him."[8] Under these facts we need not engage in the familiar metaphysics of attachment of the right to counsel. The right had attached. *See Nicholson* v. *State*, 523 So. 2d 68, 76-77 (Miss. 1988); *May* v. *State*, 524 So. 2d 957, 967 (Miss. 1988); *Jimpson* v. *State*, 532 So. 2d 985, 988-89 (Miss. 1988); *see also Page* v. *State*, 495 So. 2d 436, 439-42 (Miss. 1986); *Cannaday* v. *State*, 455 So. 2d 713, 722 (Miss. 1984). Minnick had "invoked" his right to counsel and had been furnished counsel before Deputy Sheriff Denham arrived at his San

7 *See* Rule 3.8, Miss. R. Prof. Conduct.

8 This fact is not in the record. It was conceded, however, by Minnick's appellate counsel at oral argument.

Diego jail cell.[9] Knowledge of these facts was imputed to Denham. *Arizona* v. *Roberson*, 486 U.S. 675, ____, 108 S. Ct. 2093, 2101, 100 L. Ed. 2d 704, 717 (1988). Whatever protections the right affords were Minnick's to enjoy. *Page* v. *State*, 495 So. 2d 436, 439-42 (Miss. 1986).

The facts before us, imagine this scenario. The day before trial the district attorney, or some representative of the prosecution force, *e.g.*, a deputy sheriff, visits Minnick in his jail cell. This is done without so much as a "By your leave" or "Kiss my foot" to Minnick's lawyer. The district attorney says, "Mr. Minnick, your trial begins tomorrow and there are a few points I want to clear up before the trial begins." Assume then that the district attorney (or his representative) reads Minnick the standard *Miranda* warnings and without obtaining any express acknowledgment or waiver, written or oral, proceeds to ask Minnick questions, to which Minnick responds. Assume further that Minnick is *not* told "Now, Mr. Minnick, we know that Mr. Gates is your lawyer and perhaps you ought to talk to him before we interview you;" all that is said to Minnick is the bare minimum required by *Miranda*. I cannot imagine that we would allow use at trial of the fruits of such a pre-trial interview. *See People* v. *Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 422-24, 348 N. Ed.2d 894, 898-99 (1976). What I can imagine is the language with which this Court would unanimously condemn such a shoddy practice.

How is that different from what we have here? Minnick's entitlement to the protections of counsel were not lesser on August 25, 1986, than on the day before trial. I know of no principled basis for saying that the shield of counsel and Minnick's right thereto was less potent on August 25 than on the day before trial.

The implicit premise of the majority opinion is that the accused's right to counsel and privilege against self-

9 In a very real sense this case begins the "day after" *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Today's concern is the case scenario after the *Edwards* accused has established an attorney-client relationship with a lawyer albeit in this instance an out of state public defender.

incrimination are in the jailhouse like a child at birth, alive and well but rather incompetent and defenseless, growing into a mature adult-like right only come trial time. But what in logic or law or life suggests the right to counsel ought be so regarded? The apt analogy is the full grown Minerva who sprang from the head of Zeus. The right to counsel is as full grown at the moment of attachment as it will ever be, as available to the accused then as ever, and at each point thereafter where there exists a possibility for irremedial prejudice to the accused, for once the confession is obtained, the prosecution is generally a downhill proposition. There is no more critical stage than where a confession is sought.

II.

Courts ought enforce those rules emanating from the best reading that may be given the principles that fit and justify the positive law of the state. That law ought be seen as an organic whole. The positive law possessing power this day ranges from the privilege against self-incrimination and right to counsel embedded in Article 3, Section 26 of the Mississippi Constitution of 1890, across statute and case law to Rules 1.02-1.05 of our Uniform Criminal Rules of Circuit Court Practice.

The principles which fit and provide the best, albeit far from perfect, justification for our positive law today include at least these four: (1) at each encounter following custody, the individual should be treated fairly;[10] (2) because of the realities of the criminal justice system, the accused is ordinarily weaker than the prosecution and needs special protection to assure fairness; (3) confessions are not the preferred form of evidence in a criminal prosecution; and (4) the accused should have counsel at all critical stages of the proceedings

10 For instance, the section of our Constitution dealing with the right to counsel, Article 3, § 26, is a "positive command, and without it due process of law is impossible." *Stewart* v. *State*, 229 So. 2d 53, 55 (Miss. 1969). *See also Waldrop* v. *State*, 506 So. 2d 273, 275 (Miss. 1987) ("This Court has embraced a right to . . . counsel inherent in the due process clause of the state constitution."); *Reed* v. *State*, 430 So. 2d 832, 837 (Miss. 1983).

against him. I say these principles are embedded in our positive law in the sense that no honorable and rational person who rejected these principles in any significant way could possibly have written the rules in the field—again from Section 26 of our Bill of Rights to the pre-trial provisions of our rules of criminal practice.

If the efficacy of our criminal justice system depends upon the accused not asserting or enjoying his claims and protections regarding access to counsel, then there is something very wrong with that system. I dare say no one can divine a policy of preference for ignorance or waiver in the valid rules in the field. No such policy fits the text of our rules in the field much less provides the best justification for the existence of those rules today. No one who believed that the efficacy of the criminal justice system ought depend upon a preference for ignorance of the accused or waiver of his right to counsel could possibly have written our law as it is; hence, the law cited by the majority cites—but then ignores—that there is a strong presumption against waivers of the protections of counsel.[11]

What we have said above regards the substance of the right to counsel. There is a separate and important concern regarding the form of that rule. Our law does no one a favor when it provides fuzzy rules in plastic form. Where tensions are high, controversy great, and much at stake (and there is

11 *See Michigan* v. *Jackson*, 475 U.S. 625, 633, 106 S. Ct. 1404, 89 L. Ed. 2d 631, 640 (1986); *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). A waiver ought be accepted only if made with full awareness of "the dangers and disadvantages of self-representation," *Faretta* v. *California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975); *see also Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 241, 87 L. Ed. 268 (1942) (accused "may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with his eyes open"). Indeed, "courts indulge in every reasonable presumption against waiver," *Brewer* v. *Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424, 440 (1977). I am no devotee of subjective standards within our law. Still it takes little awareness or common sense to realize that objectively adequate warnings by an opposing party, whether detailed or cursory, simply cannot satisfy this high standard.

never more at stake than in a case of capital murder), the need for bright line rules is at its highest. The form of the rule formally realizing the accused's right to counsel should provide an identifiable line between what may be done and what may not. All should be told that, once the right to counsel has attached, the accused may be dealt with only through counsel. Such clarity in expression is as important to law enforcement as to the citizen. *See Arizona* v. *Roberson*, 486 U.S. 675, ____, 108 S. Ct. 2093, 2097, 100 L. Ed. 2d 704, 713 (1988). This is no novel idea. Did not even *Miranda* say as much?[12]

We have this sort of rule in civil cases. It seems to work well. Its predicate is fairness. If such a rule obtains in civil cases, where there is no constitutional right to counsel, what reason or principle can there be for denying a like rule in a criminal case where there is such a right?[13] If the rule obtains in civil cases where mere money is at stake, why not where the executioner approaches?

I respectfully dissent.

GRIFFIN, J., not participating.

12 "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda* v. *Arizona*, 384 U.S. 436, 474, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 723 (1966).

13 *State* v. *Sparklin*, 296 Or. 85, 672 P.2d 1182, 1187 (1983); *People* v. *Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 422, 348 N.E.2d 894, 898 (1976).

Letter dated March 2, 1989 of Amy D. Whitten, Esq. (Administrator of the Supreme Court of Mississippi) to Leslie C. Gates, Esq. and Marvin L. White, Jr., Esq. regarding petitioner's motion for rehearing and requesting briefs in light of *Roper* v. *Georgia*, 375 S.E.2d 600 (Ga. 1989)

[On the Letterhead of the Supreme Court of Mississippi]

March 2, 1989

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Re: Robert Minnick v. State
No. DP-79
Petition for Rehearing

Ladies and Gentlemen:

In connection with its consideration of the petition for rehearing in the above case, the Court desires a supplemental brief from each of you.

We invite your comments on the recent decision of the Supreme Court of Georgia in *Roper* v. *State*, 375 S.E.2d 600 (Ga. 1989), decided February 2, 1989, and, particularly, your views on whether *Roper* is a correct exposition of the law and, if so, upon the effect, if any, *Roper* might have on the case at bar.

This is to advise that each of you have until March 21, 1989, to file your supplemental brief.

Sincerely yours,

AMY D. WHITTEN

Court Administrator

Order of the Supreme Court of Mississippi denying petitioner's motion for rehearing dated October 25, 1989

SUPREME COURT OF MISSISSIPPI

MINUTE BOOK

Year 1989—Book 2

WEDNESDAY, OCTOBER 25, 1989:

EN BANC

03-DP- 0079 *Robert S. Minnick* v. *State of Mississippi*; Appeal No. 6045 from Judgment dated MAY 23, 1987, Clarke County Circuit Court; DISPOSITION—On Change of Venue to Lowndes County. Petition for Rehearing Denied. Roy Noble Lee, C.J., Hawkins, P.J., Dan Lee, P.J., and Anderson, J., Concur. Prather, Robertson, and Sullivan, JJ. Dissent. Pittman and Blass, JJ., Not Participating.

Order of the Supreme Court of the United States granting petition for writ of certiorari and motion for leave to proceed *in forma pauperis* dated April 23, 1990

SUPREME COURT OF THE UNITED STATES

No. 89-6332

Robert S. Minnick,

Petitioner

v.

Mississippi

On PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Mississippi.

On CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 23, 1990

(6)

No. 89-6332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT S. MINNICK,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED DECEMBER 19, 1989
CERTIORARI GRANTED APRIL 23, 1990

42 pp

QUESTION PRESENTED

Is it consistent with the Fifth and Sixth Amendments, as they apply to the states through the Fourteenth Amendment, for police to reinitiate interrogation of an accused in custody without counsel present despite the fact that the accused has counsel and has expressed the desire to deal with law enforcement officials only through that attorney?

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IN THE _____

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-6332

ROBERT S. MINNICK,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR PETITIONER

This brief is respectfully submitted by petitioner Robert S. Minnick who was convicted of capital murder and sentenced to death in Mississippi in 1988. Minnick seeks reversal of the judgment of the Mississippi Supreme Court which affirmed his conviction and sentence.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi on direct appeal affirming petitioner's capital murder conviction and death sentence is reported as *Minnick* v. *Mississippi*, 551 So. 2d 77 (Miss. 1988); it is reprinted at JA 69.[1]

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1 "JA _____" references are to pages in Joint Appendix.

JURISDICTION

The judgment of the Mississippi Supreme Court affirming on direct appeal Minnick's conviction and death sentence was entered on December 14, 1988. A motion for rehearing was timely filed on January 5, 1989 and was denied on October 25, 1989. The petition for certiorari was filed on December 19, 1989 and was granted on April 23, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. These provisions are set forth in the Statutory Appendix to this brief.

STATEMENT OF THE CASE

Robert Minnick was convicted of capital murder in Lowndes County, Mississippi and was sentenced to death on August 6, 1987. His conviction and sentence were affirmed on December 14, 1988 (JA 69). A petition for certiorari was filed on December 19, 1989 and granted April 23, 1990.

STATEMENT OF FACTS

The conviction of Robert Minnick for capital murder stemmed from the deaths of Lamar Lafferty and Donald Ellis Thomas, which occurred on April 26, 1986.[2] On Friday, August 22, 1986, Minnick was arrested in San Diego, California pursuant to capital murder warrants issued in Clarke County, Mississippi (JA 7, 27). On the same day, California

2 According to the facts recited in the Mississippi Supreme Court's opinion, James "Monkey" Dyess, the other participant in the crime, shot one of the victims in the back with a shotgun, and then told Minnick to shoot the second person (JA 72-73).

authorities advised Mississippi law enforcement officials that the arrest had been made (JA 27). When questioned by San Diego police about the crimes he allegedly committed in Mississippi, Minnick remained silent (JA 43).

The next day, August 23, 1986, two agents from the Federal Bureau of Investigation (the "FBI") stationed in San Diego sought to interview Minnick (JA 13). Despite the fact that Minnick told his San Diego jailers that he did not wish to see the FBI agents, the jailers "made [Minnick] go down anyhow" to speak with the agents (JA 45). At the interrogation Minnick refused a request that he sign a waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when a waiver form was presented by the FBI agents (JA 14). Minnick ultimately did talk with the agents about matters unrelated to the capital murder charges against him (JA 14-15). When questioned by the FBI agents about the two Mississippi homicides for which he had been arrested, however, Minnick refused to speak further and explicitly invoked his right to have counsel appointed to represent him (JA 15-16). Minnick told the agents (as the FBI report set forth) to " '[c]ome back Monday when I have a lawyer,' and stated that he would make a more complete statement then with his lawyer present" (JA 16). Minnick twice repeated his request for counsel to the agents (*id.*).[3] The FBI agents respected Minnick's requests and ceased their interrogation (*id.*). Later that day, Minnick was provided with a San Diego public defender with whom he met (JA 46, 113).

Upon learning of Minnick's arrest, Deputy Sheriff J.C. Denham of the Clarke County Sheriff's Department flew to San Diego on August 24, 1986 to interrogate Minnick and escort him back to Mississippi (JA 58, 72). On Monday

3 The FBI report stated:

"MINNICK stated 'Come back Monday when I have a lawyer,' and stated that he would make a more complete statement then with his lawyer present."

"At this point no further questions were asked concerning the crimes . . . ."

"MINNICK repeated twice his request that Agents come to see him on Monday as soon as he had a lawyer." (JA 16)

morning, August 25, Deputy Denham went to the county jail in San Diego. The Mississippi Supreme Court determined that "[w]hen Denham arrived at the jail, the jailers told Minnick that he would have to go down and talk with Denham" (JA 74; *see also* 45).[4] No effort was made to notify Minnick's attorney of the impending reinterrogation. When asked at trial whether he had known that Minnick had invoked his right to counsel when interviewed by the FBI agents, Deputy Denham acknowledged that he had "a copy of the interview that the FBI conducted" (JA 38); the interview report reveals that Minnick had twice invoked his right to counsel and had declined to speak without his attorney being present (JA 16). *See* note 3 *supra*.

Notwithstanding that Minnick already had counsel, Deputy Denham began his uninvited reinitiated interrogation by reading Minnick his *Miranda* rights, which included statements suggesting that Minnick did not already have counsel (*e.g.*, "If you cannot afford a lawyer one will be appointed for you before any questioning if you wish") (JA 28-29). Deputy Denham then asked Minnick if he would sign a waiver of rights statement (JA 29, 38). Minnick refused to sign the statement, which provided as follows:

> "I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." (JA 29)

Minnick refused to discuss the homicide or to respond to Deputy Denham's questions about it (JA 74). When pressed by Deputy Denham, Minnick first acquiesced in the request that he discuss his escape from the Clarke County Jail, but refused to discuss the charges of murder (*id.*). Then, according to Deputy Denham, Minnick confessed to his role in the homicides (JA 32-33).

4 Minnick's undisputed testimony was that his jailers told him that his lawyer—who had advised Minnick not to respond to any questions by the police—"wasn't nothing" and that he "had to talk to them [the police]" (JA 47).

Prior to trial, Minnick's attorney filed three motions challenging the admissibility of the confession (JA 17-18, 21-22, 23-24). Counsel specifically relied on this Court's decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (JA 23). The trial court denied the original motion to suppress (JA 19), denied it again when renewed (JA 20), and adhered to its decision at trial when the State put on Deputy Denham to testify about Minnick's inculpatory statements (JA 25).

At Minnick's capital murder trial, the confession was the central focus of the State's case. It was relied on by the State in the prosecutor's opening (Tr. 713-14)[5], and argued to the jury in closing (Tr. 1094-95, 1122). Deputy Denham testified at length about the investigation he conducted into the murders (Tr. 914-55), which was capped by his interrogation of Minnick and the resulting inculpatory statements (JA 59-65). No other evidence dealt with any inculpatory statements by Minnick; Minnick himself did not testify. Minnick was convicted of capital murder and sentenced to death (JA 67).

On direct appeal to the Mississippi Supreme Court, counsel to Minnick again argued that once Minnick had invoked his right to have counsel present, no state-initiated interrogation was constitutional in the absence of the attorney who had been appointed to represent him (JA 75).

In rejecting Minnick's Fifth Amendment claim under *Edwards* v. *Arizona*, the Mississippi court held:

> "While it is true Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him. In this kind of situation, the *Edwards* bright-line rule as to initiation does not apply. The key phrase in *Edwards* which applies here is 'until counsel has been made available to him.' [*Edwards* v. *Arizona*, 451 U.S.]

5 "Tr. _____" references are to the Transcript as filed with the Mississippi Supreme Court.

at 485, 101 S. Ct. at 1885." (JA 75-76; footnote omitted)

"Since counsel was made available to Minnick," the Mississippi Supreme Court held, "his Fifth Amendment right to counsel was satisfied" (JA 76), despite the reinitiated interrogation by the State.

Minnick's Sixth Amendment claim fared no better. Although the Mississippi court recognized the concession of the State that Minnick's right to counsel had attached before Deputy Denham's interrogation (JA 76), the court nonetheless held that because Minnick knew he had the right to have counsel present during Deputy Denham's reinitiated interrogation and Minnick had spoken to counsel, he must have effectively waived that right. The court made no mention of the rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), which prohibits all state-initiated interrogation once an accused's Sixth Amendment right to counsel has attached and been asserted. The court went on to acknowledge that, during his interrogation by Deputy Denham, Minnick had "refused to sign a waiver of rights form," apparently believing that he was not waiving his rights (JA 78). Instead of concluding from this that Minnick had plainly not intended to waive any rights, the court concluded instead that Minnick had done so.

In dissent, Justice Robertson maintained that the majority's interpretation of *Edwards* v. *Arizona* was inconsistent with that ruling's holding and spirit (JA 114-15, 117). To illustrate the wrong done in this case, Justice Robertson analogized to the ethical rules governing civil cases:

> "We have a rule that seems to work well in civil cases. A lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present. At the very least he must give notice of his intentions to or obtain consent of opposing counsel. This rule is undergirded by an ethical principle. All accept that a lawyer who approaches a represented third party without going through counsel should be severely sanctioned. And this is so though the lawyer uses a lay representative or paralegal to do his dirty work." (JA 112; footnotes omitted)

Justice Robertson concluded that the majority's reading of the facts to construe a waiver of Minnick's Sixth Amendment right amounted to "a policy of preference for ignorance or waiver in the valid rules in the field" (JA 116) and was irreconcilable with the "strong presumption against waivers of the protections of counsel" (JA 116; citation omitted). Justice Robertson concluded:

> "Where tensions are high, controversy great, and much at stake (and there is never more at stake than in a case of capital murder), the need for bright line rules is at its highest. The form of the rule formally recognizing the accused's right to counsel should provide an identifiable line between what may be done and what may not. All should be told that, once the right to counsel has attached, the accused be dealt with only through counsel. Such clarity in expression is as important to law enforcement as to the citizen. *See Arizona* v. *Roberson*, 486 U.S. 675, ____, 108 S. Ct. 2093, 2097, 100 L. Ed. 2d 704, 713 (1988). This is no novel idea. Did not even *Miranda* say as much?" (JA 116-17)[6]

SUMMARY OF ARGUMENT

Numerous decisions of this Court construing the Fifth and Sixth Amendments require reversal.

This Court's decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), mandates reversal on Fifth Amendment grounds because the State violated Minnick's constitutional privilege against compelled self-incrimination. Under *Edwards* v. *Arizona*, if the accused invokes the right to counsel, the

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6 In response to Minnick's petition for rehearing (which was denied by a 4-3 vote) (JA 119), the Mississippi Supreme Court posed the question to the parties of whether the outcome of the court's interpretation of *Edwards* should be changed in light of the decision in *Roper* v. *Georgia*, 258 Ga. 847, 375 S.E.2d 600 (Ga.), *cert. denied*, 110 S. Ct. 290 (1989) (JA 118).

police are required to respect that request, cease interrogation, and not reinitiate interrogation in the absence of counsel. The two FBI agents respected Minnick's Fifth Amendment rights as set forth in *Edwards*. Deputy Denham did not. The interpretation of *Edwards* offered by the Mississippi Supreme Court to justify Deputy Denham's actions would allow the police to compel an accused to submit to reinitiated interrogation without notice to the accused's attorney, and without the attorney's presence, even though the accused has demanded counsel and an attorney-client relationship actually exists. This rule finds no support in *Edwards* itself and is flatly inconsistent with this Court's later characterizations of that opinion. It is also inconsistent with the reading of *Edwards* v. *Arizona* repeatedly given by lower federal and state courts and the law enforcement community.

Further, because Minnick's Sixth Amendment right to counsel attached upon the issuance by Mississippi of the capital murder arrest warrants, and because Minnick unequivocally invoked that right, his confession was the unconstitutional product of police-initiated interrogation in violation of *Michigan* v. *Jackson*, 475 U.S. 625 (1986). Mississippi was required to use Minnick's attorney as the sole medium in substantive dealings with Minnick about the case. *Maine* v. *Moulton*, 474 U.S. 159 (1985); *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964).

Decisions such as *Edwards* v. *Arizona* and *Michigan* v. *Jackson* are now well-established articulations of the commands of the Fifth and Sixth Amendments. See *Michigan* v. *Harvey*, 110 S.Ct. 1176 (1990). The ruling of the Mississippi Supreme Court here is at odds with the core of those rulings.

ARGUMENT

I.

THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

To assure the protection of the Fifth Amendment privilege, this Court has long held that certain procedural safeguards must be enforced. Because the inherent pressures of custodial interrogation threaten this constitutional guarantee with particular force, the decisions of this Court have sought to ensure that any potentially incriminating statement made in that context is a product of free will. *E.g.*, *Edwards* v. *Arizona*, 451 U.S. 477 (1981); *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The incriminating statements extracted from Minnick by Deputy Denham contravened these guarantees and, therefore, violated Minnick's privilege against compulsory self-incrimination: Minnick was compelled to see Deputy Denham after invoking his Fifth Amendment right to counsel; the initiative for the reinterrogation was Deputy Denham's; and the reinterrogation occurred without Minnick's attorney being present or even notified. The decision of the Mississippi court allowing police-initiated reinterrogation after the invocation of counsel and countenancing the exclusion of the accused's counsel from such reinitiated interrogation is in direct conflict with governing authorities of this Court. In circumstances such as these—in fact, in circumstances less egregious than these—this Court has consistently vacated convictions based on statements made during custodial interrogation.

A. This Court's Decision In *Edwards* v. *Arizona* Mandates Reversal

The judgment of the Mississippi Supreme Court affirming the conviction and sentence here is at odds with repeated decisions by this Court recognizing that the Fifth Amendment privilege against self-incrimination is "the essential mainstay

of our adversarial system." *Miranda* v. *Arizona*, 384 U.S. at 460. Specifically, this case is directly controlled by *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

Without more, the extraordinary similarity between this case and *Edwards* mandates reversal. In *Edwards* this Court reiterated deeply rooted Fifth Amendment principles, emphasizing that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards* v. *Arizona*, 451 U.S. at 485. Moreover, this Court specifically confirmed that "[t]he Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation." *Id.* at 485-86.[7]

After the issuance of an arrest warrant, Edwards was arrested on charges of robbery, burglary and first-degree murder. At the police station, Edwards was informed of his *Miranda* rights; he stated that he understood his rights and initially agreed to submit to interrogation. Edwards denied involvement, offered an alibi defense and sought to make a deal. The interrogating officer gave Edwards an attorney's phone number and, following the conversation, Edwards said: " 'I want an attorney before making a deal.' " Apparently the officer considered this an invocation of Edwards' Fifth Amendment rights because questioning then ceased. *Id.* at 478-79.

The next morning, two different officers came to the jail and asked to see Edwards. Edwards refused to see anyone but "[t]he guard told him that 'he had' to talk and then took him to meet with the detectives." *Id.* at 479. The officers informed Edwards of his *Miranda* rights and played him the taped statement of his alleged accomplice who had implicated him. Edwards, afterwards, agreed to talk so long as it was not taped and went on to implicate himself in the crime. *Id.*

7 Concurring opinions in *Edwards* agreed that when a suspect is "taken from his cell against his will and subjected to renewed interrogation . . . it clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel." *Edwards* v. *Arizona*, 451 U.S. at 490 (Powell & Rehnquist, JJ., concurring). *See also id.* at 488 (Burger, C.J., concurring).

Because Edwards was compelled to see the officers—who returned not at his suggestion or request—after invoking his right to counsel and because Edwards was reinterrogated without counsel present, the Court held that the use of the compelled confession against him at trial violated his Fifth Amendment rights. *Id.* at 487. The *Edwards* Court determined that the Supreme Court of Arizona had erred in finding that the statements made by Edwards after he was "told he had to" speak to the officers were the product of a voluntary waiver. *Id. See also id.* at 488 (Burger, C.J., concurring); *id.* at 490 (Powell and Rehnquist, JJ., concurring).

This case may be resolved on the fundamental legal principles reinforced by the *per se* rule of *Edwards*. When the FBI agents sought to question Minnick about the two homicides for which he had been arrested, he refused to see them but was told he had to speak with them (JA 45); Minnick—like Edwards—invoked his right to have counsel present, and told the agents to come back when he had a lawyer present (JA 16).[8] The FBI agents respected Minnick's request and ceased their interrogation (JA 16). After the FBI interrogation, Minnick was provided with an attorney who spoke with him (JA 46, 74).

Similar to the treatment Edwards received, the Mississippi Supreme Court found that "when Deputy Denham arrived at the jail two days later," the jailers "told Minnick that he would have to go down and talk to Denham" (JA 74). Deputy Denham again informed Minnick of his *Miranda* rights—as if he had no lawyer at all—and began to interrogate him (*id.*). Minnick refused to sign a waiver form (*id.*), refused to discuss the murder and also refused to give a signed statement or to allow any recording to be made (JA 38). No lawyer was present during this reinitiated interrogation, although Minnick had previously asserted his right to counsel and had

8 From the beginning, Minnick consistently resisted efforts to interrogate him. For example, on August 22, when the San Diego police first sought to interrogate him, Minnick "would tell them nothing and . . . didn't look at them" (JA 43). On August 23, Minnick told the jailers that he did not wish to talk with the FBI, but was nonetheless compelled to do so (JA 45).

been appointed counsel with whom he had consulted (JA 46, 113). It was at this reinitiated interrogation that Minnick's incriminating statements were obtained (JA 61-63). This case, like *Edwards*, should be reversed because of a patent violation of the accused's Fifth Amendment rights.

B. The Judgment Below Rests On A Distorted Reading Of *Edwards* v. *Arizona*

In holding the *Edwards* rule inapplicable, the Mississippi Supreme Court concluded that reinterrogation after an accused has invoked his Fifth Amendment right to counsel is proper because "[t]he key phrase in *Edwards* which applies here is 'until counsel has been made available to him' " (JA 76, quoting *Edwards* v. *Arizona*, 451 U.S. at 484-85). When this "key" phrase is replaced in the passage from which it was extracted, however, it is apparent that the Mississippi Supreme Court distorted this Court's language and decision in *Edwards*:

> "[W]e now hold that when the *accused has invoked his right to have counsel present during custodial interrogation*, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, *having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him*, unless the accused himself initiates further communication, exchanges, or conversations with the police.
>
> "*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused '*the interrogation must cease until an attorney is present*.' 384 U.S. at 474. Our later cases have not abandoned that view." *Edwards* v. *Arizona*, 451 U.S. at 484-85 (JA 75; emphasis supplied; footnote omitted).

Given the language preceding and following this "key" phrase, it is inconceivable that this Court intended to require the mere *availability* of counsel, which the Mississippi Supreme Court suggests means a brief consultation, rather than the actual *presence* of counsel. This reading is compelled for two reasons.

First, before the "key" phrase, the Court plainly stated that an accused's Fifth Amendment right is "to have counsel *present* during custodial interrogation." *Edwards* v. *Arizona*, 451 U.S. at 484 (emphasis supplied). The next clause, rather than addressing the "right," set parameters for the *waiver* of the right. At this point, the Court restated its holding in *Miranda* that the invocation of the Fifth Amendment right to counsel is "a significant event" requiring that " 'interrogation must cease until an attorney is present.' " *Id.* at 485 (*quoting Miranda* v. *Arizona*, 384 U.S. at 474).

Second, with this clear Fifth Amendment rule in place, the language in the sentence immediately preceding the "key" phrase takes on a more precise meaning. When the Fifth Amendment right to have counsel present is invoked, the accused has "expressed his desire to deal with the police only through counsel." *Id.* at 484. Yet the reading of these words by the Mississippi Supreme Court never requires the police to deal *through* counsel at all.[9]

In *Miranda*, this Court observed that the danger inherent in custodial interrogation is that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so

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9 In addition, although the rule requires that counsel be made available to the accused, nothing in *Edwards* suggests that this means that counsel, once appointed, may thereafter be cut-out of the state's substantive contacts with the accused. This is particularly true where, as here (JA 16), the accused has stated that a precondition to his giving a statement is that counsel be present at the interrogation.

freely." *Miranda* v. *Arizona*, 384 U.S. at 467.[10] The *Miranda* Court stressed that it was counsel's presence that was crucial: "The *presence* of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His *presence* would ensure that statements made in the government-established atmosphere are not the product of compulsion." *Id.* at 466 (emphasis supplied). The actual presence of counsel would "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469. The Mississippi Supreme Court's "rule" that mere consultation with counsel satisfies Fifth Amendment requirements is at odds with the core holding of *Miranda*:

> "Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, *the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.*" *Id.* at 470 (emphasis supplied; citation omitted).[11]

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10 The *Miranda* Court reviewed the techniques of persuasion and the psychological ploys listed, and specifically encouraged, in police policy manuals to increase the number of confessions. *Miranda* v. *Arizona*, 384 U.S. at 449-54. The Court concluded that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455 (footnote omitted). *See also Illinois* v. *Perkins*, 58 U.S.L.W. 4737 (U.S. June 4, 1990) (No. 88-1972) (confirming the necessity of *Miranda*'s protections during custodial interrogation); *Rhode Island* v. *Innis*, 446 U.S. 291, 299 (1980) (construing broadly "techniques of persuasion" as "interrogation" because "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination").

11 In *Fare* v. *Michael C.*, 442 U.S. 707 (1979), this Court reiterated that the *per se* rule of *Miranda*—that an accused has the right to have an attorney present at a custodial interrogation—is "based on the unique role the lawyer plays in the adversary system of criminal justice in this country." *Id.* at 719. Specifically, the *Fare* Court recognized that the rule in *Miranda*

> "was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system' established by the Court. *Id.*, at 469. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. 384 U.S. at 470." *Id.*

Miranda established, and *Edwards* confirmed, two clear rules applicable here: (1) the accused has a right to have an attorney present during custodial interrogation, and (2) when an accused invokes his right to counsel, the authorities must stop the interrogation and may not compel the accused to undergo further interrogation without an attorney present. The judgment below cannot be reconciled with these rules.

C. The Mississippi Supreme Court's Ruling Is Inconsistent With This Court's Characterizations Of *Edwards* v. *Arizona*

1. Subsequent Decisions Of This Court Have Reaffirmed An Accused's Fifth Amendment Right To Have Counsel Present At A Custodial Interrogation

Until the Mississippi Supreme Court reinterpreted *Edwards* in this case, there was little confusion as to the meaning of this Court's decision.[12] This Court has reaffirmed that the

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12 Other courts have generally agreed that *Miranda* and *Edwards* forbid any state-initiated interrogation without counsel present once the accused has requested that counsel act as a medium between him and the government. *E.g.*, *Towne* v. *Dugger*, 899 F.2d 1104, 1106 (11th Cir. 1990) (*Edwards* requires that once an accused requests counsel, "all questioning must stop

Fifth Amendment requires that reinterrogation only occur with counsel *present*. For example, in *Moran* v. *Burbine*, 475

until an attorney is present, unless the defendant subsequently initiates conversation with the authorities"); *Smith* v. *Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) ("[n]ot only must all questioning stop when a suspect expresses his desire for counsel, but questioning can be resumed without a lawyer only if the suspect himself initiates further communication"); *Terry* v. *LeFevre*, 862 F.2d 409, 412 (2d Cir. 1988) (*Edwards* requires that "once counsel is requested, all interrogation must cease until an attorney is present"); *McFadden* v. *Garraghty*, 820 F.2d 654, 657-58 (4th Cir. 1987) (*Miranda* and *Edwards* require that when an accused requests counsel, interrogation must cease until an attorney is present); *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 126 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (after the accused's assertion of his right to counsel, he was "to be assisted by counsel at any interrogation, concerning any crime, that the police or prosecutors conducted while he remained in continuous physical custody"); *Pittman* v. *Black*, 764 F.2d 545, 546 (8th Cir.), *cert. denied*, 474 U.S. 982 (1985) (*Edwards* requires that after an accused requests counsel, "he cannot be subjected to further interrogation in the absence of counsel" unless he initiates further communications with the police); *United States* v. *Scalf*, 708 F.2d 1540, 1543 (10th Cir. 1983) (recognizing that *Edwards* was expressly decided upon *Miranda*'s requirement that after the invocation of the right to counsel interrogation must cease until counsel is present); *United States* v. *Weisz*, 718 F.2d 413, 428 n.93 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1027, 1034 (1984) ("*Miranda* and subsequent decisions establish beyond question that if an 'individual states that he wants an attorney, the interrogation must cease until an attorney is present' ").

The rulings of state supreme courts have been almost as uniform. *See, e.g.*, *Colorado* v. *Trujillo*, 773 P.2d 1086, 1091 (Colo. 1989) (*en banc*) (*Edwards* requires that "once a defendant requests counsel during custodial police interrogation, all 'interrogation must cease until an attorney is present' "); *Shipley* v. *Delaware*, 570 A.2d 1159, 1167 (Del. 1990) (once an accused requests counsel, the police must "cease their interrogation until counsel is present"); *Roper* v. *Georgia*, 258 Ga. 847, 375 S.E.2d 600, 602, *cert. denied*, 110 S. Ct. 290 (1989) (under *Edwards* "once an accused in custody invokes the right to counsel, he should not be subject to further interrogation by the authorities until counsel is present," unless the accused initiates further contact with the police); *Illinois* v. *Gacho*, 122 Ill. 2d 221, 522 N.E.2d 1146, 1154, *cert. denied*, 109 S. Ct. 264 (1988) ("[u]nder *Miranda* and its progeny, once an individual states that he wants an attorney, all interrogation must cease until an attorney is present"); *Doerner* v. *Indiana*, 500 N.E.2d 1178, 1180 (Ind. 1986) (Fifth and Fourteenth Amendments guarantee "to each citizen the right to the presence and advice of counsel during custodial interrogation by the police"); *Iowa* v. *Newsom*, 414 N.W.2d 354, 357 (Iowa

U.S. 412 (1986), this Court rejected the suggestion that "the Fifth Amendment 'right to counsel' requires anything more than that the police inform the suspect of his right to representation and honor his request that the *interrogation cease until his attorney is present*." *Moran* v. *Burbine*, 475 U.S. at 423 n.1 (*citing Michigan* v. *Mosley*, 423 U.S. 96, 104 n.10

1987) (*Edwards* requires that after invocation of the right to counsel, "absent counsel further interrogation may not occur unless the accused initiates the subsequent conversation"); *Louisiana* v. *Arceneaux*, 425 So. 2d 740, 744 (La. 1983) (*Edwards* holds that after "an accused has invoked his right to have counsel present during custodial interrogation," the accused cannot waive this right by merely responding to police initiated interrogation); *Maryland* v. *Conover*, 312 Md. 33, 537 A.2d 1167, 1168 (1988) (*Edwards* requires that after an accused requests an attorney, "interrogation must cease until an attorney is present," unless the accused initiates further contact with the police); *Missouri* v. *Morris*, 719 S.W.2d 761, 763 (Mo. 1986) (*en banc*) ("the request for counsel bars further interrogation until an attorney is present, unless the accused in the interim voluntarily initiates discussion"); *Nebraska* v. *Pratt*, 234 Neb. 596, 452 N.W.2d 54, 57 (1990) ("*Edwards* held that when an accused asserts the right to counsel, interrogation must cease until counsel is present *or* the accused initiates further communications"); *Koza* v. *Nevada*, 102 Nev. 181, 718 P.2d 671, 674 (1986), *appeal after remand*, 756 P.2d 1184 (Nev. 1988), *cert. denied*, 109 S. Ct. 2069 (1989) ("[o]nce an accused has asserted the right to counsel, all interrogation must cease until an attorney is present"); *Ohio* v. *Broom*, 40 Ohio St. 3d 277, 533 N.E.2d 682, 692 (1988), *cert. denied*, 109 S. Ct. 2089 (1989) ("once an accused has invoked a right to counsel, the state must cease all questioning unless counsel is present"); *Vermont* v. *Preston*, 150 Vt. 511, 555 A.2d 360, 362 (1988) (state violated *Edwards* by interrogating the defendant in an "uncounselled setting" after the invocation of his right to counsel); *Washington* v. *Stewart*, 113 Wash. 2d 462, 780 P.2d 844, 847 (1989) (*en banc*), *cert. denied*, 110 S. Ct. 1327 (1990) ("to protect the integrity of the *Miranda* rule, *Edwards* established an exclusionary rule in the event evidence is obtained in counsel's absence, after the accused has requested counsel's presence"); *West Virginia* v. *Bowyer*, 380 S.E.2d 193, 196 (W. Va. 1989) (after an accused invokes his right to counsel, "it is improper for the police to initiate any communication with the suspect other than through his legal representative"); *Wisconsin* v. *Turner*, 136 Wis. 2d 333, 401 N.W.2d 827, 834 (1987) (holding *Edwards* "not at all inconsistent" with principle that the invocation of the right to counsel "triggers a *per se* termination of questioning until an attorney is present"). *But see South Carolina* v. *Zaremba*, 386 S.E.2d 459, 460 (S.C. 1989); *South Dakota* v. *Cody*, 323 N.W.2d 863, 867 (S.D. 1982).

(1975)) (emphasis supplied). *See also Arizona* v. *Roberson*, 486 U.S. 675, 680 (1988) ("[t]he rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that '[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present' "); *Michigan* v. *Jackson*, 475 U.S. at 629 ("[t]he Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations"); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1043 (1983) (plurality) (Op. of Rehnquist, J.) ("[i]n *Edwards* . . . [w]e held that subsequent incriminating statements made without his attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments").

On numerous occasions since *Edwards*, this Court has focused on the importance of an attorney's presence because of the inherently coercive nature of custodial interrogation. *See, e.g., Michigan* v. *Harvey*, 110 S. Ct. 1176, 1180 (1990) ("*Edwards* thus established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights"). Repeatedly, this Court has stated that the Fifth Amendment right against self-incrimination "is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges." *Arizona* v. *Roberson*, 486 U.S. at 685 (holding that *Edwards* applies even when the second police-initiated interrogation occurs in the context of a separate investigation). *See also Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) ("[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny"); *Arizona* v. *Mauro*, 481 U.S. 520, 529-30 (1987) (recognizing the purpose behind *Miranda* and *Edwards* is "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment").

2. The "Bright-Line" Character Of *Edwards* Has Provided Clear And Enforceable Guidance For Law Enforcement Officials

The *Edwards* rule is not, as the Mississippi Supreme Court suggested (JA 75-76), one that requires the authorities merely to permit a brief consultation with counsel before an accused who has invoked his right to have counsel present may be reinterrogated. Instead, *Edwards* itself held that to protect a suspect's Fifth Amendment rights, a valid waiver of the right to counsel cannot be found absent "the *necessary fact* that the accused, not the police, reopened the dialogue with the authorities." 451 U.S. at 486 n.9 (emphasis supplied). And in *Solem* v. *Stumes*, 465 U.S. 638 (1984), this Court stated:

> "*Edwards* established a bright-line rule to safeguard preexisting rights, not a new substantive requirement. Before and after *Edwards* a suspect had a right to the presence of a lawyer, and could waive that right. *Edwards* established a new test for when that waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication." 465 U.S. at 646.[13]

These consistent interpretations of *Edwards*, in turn, have produced clear guidance for the law enforcement officers who are called upon to respect the rule. The creation of a "bright-line" rule has "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation." *Fare* v. *Michael C.*, 442

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13 *See also Arizona* v. *Roberson*, 486 U.S. at 680-81 (*Edwards* "concluded that reinterrogation may only occur if 'the accused himself initiates further communication, exchanges or conversations with the police' "); *Moran* v. *Burbine*, 475 U.S. at 423 n.1 ("[w]hen a suspect *has* requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation") (emphasis in original); *Oregon* v. *Bradshaw*, 462 U.S. at 1044 (plurality) (Op. of Rehnquist, J.) (in *Edwards* "we held that after the right to counsel has been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police' ").

U.S. at 718.[14] With particular regard to *Edwards*, this Court has stated: "The *Edwards* rule thus serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Arizona* v. *Roberson*, 486 U.S. at 682. Elsewhere, this Court recognized the problems inherent in situations without the *Edwards* rule: "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (*per curiam*) (citations omitted).

14 One of the benefits of a "bright-line" rule is that it provides a comprehensible standard by which law enforcement officers may conduct their business. As was stated in *Rhode Island* v. *Innis*: "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures . . . ." 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). *See also Arizona* v. *Roberson*, 486 U.S. at 681 ("[w]e have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*") (citations omitted).

Police procedures reflect respect for, as well as the ability to enforce, *Edwards*. A review of manuals developed to guide law enforcement officers in the fulfillment of their duties reveals no instance where the officers are told that they may reinitiate interrogation in the absence of counsel once the suspect has requested an attorney. *E.g.*, J. Ferdico, *Criminal Procedure for the Criminal Justice Professional* at 312 (4th ed. 1989) (once right to counsel is invoked "police may not further interrogate the defendant without affording him or her counsel, unless the defendant initiates further communication with the police"); F. Inbau, J. Reid & J. Buckley, *Criminal Interrogation and Confessions* at 291 (3d ed. 1986) (*Edwards* established "[a] prerequisite to the validity of any waiver that may follow an initial exercise of *Miranda* rights is that the suspect himself must initiate a willingness to talk"); Legal Bureau, Police Department of the City of New York, *Constitutional Criminal Law: Legal Policy* at 81 (Jan. 1990) ("whenever a person's Right to counsel has attached [including after a request for an attorney], he may *not* be questioned about the case *unless* and *until* a lawyer is physically present when he agrees to speak to the police") (emphasis in original); D. Rutledge, *Criminal Interrogation Law and Tactics* at 87 (1987) ("once a suspect is in custody or has been formally charged, if he requests an attorney," he can be further questioned only where "he himself independently decided to initiate renewed discussion" or he "knowingly relinquished his right to counsel").

A rule advising police officers that, once counsel has been requested (and, as in this case, actually provided), interrogation may not be reinitiated without counsel being present is both clear and commonsensical.[15] The interpretation adopted here by the Mississippi Supreme Court, on the other hand, would instruct police officers that they need only allow the suspect to have the most minimal contact with counsel, and that they could reinitiate interrogation without counsel present in an effort to override the suspect's clearly expressed wishes. The rule announced by the Mississippi court in this case is directly contrary to *Edwards*.

15 Even if the record left open (which it does not, *supra* at 4) the question of whether Deputy Denham personally knew that Minnick had formally invoked his right to counsel, it would not matter because "[t]he police department's failure to honor that request [for counsel] cannot be justified by the lack of diligence of a particular officer." *Arizona* v. *Roberson*, 486 U.S. at 688. The only way to ensure that the accused's demand for counsel, properly memorialized in a written report by the first interrogating officer, is respected is to require that "[c]ustodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel." *Id.* Accordingly, it is of "no significance . . . that the officer who conducted the second interrogation did not know that respondent had made a request for counsel." *Id. Accord Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (promise by one prosecutor to defendant attributed to Government). It is incumbent upon the law officer to determine whether the accused has requested counsel. *Arizona* v. *Roberson*, 108 S. Ct. at 2101.

As this Court noted in *Michigan* v. *Jackson*, "Sixth Amendment principles require that we impute the State's knowledge from one State actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendant's unequivocal request for counsel to another state actor (the court)." 475 U.S. at 634 (footnote omitted). The fact that Deputy Denham was from Mississippi and Minnick was in a San Diego jail cell makes no difference in imputing the knowledge that the request had been made. *See Cervi* v. *Kemp*, 855 F.2d 702, 706 n.10 (11th Cir. 1988) (Georgia investigator held to know of defendant's invocation of counsel in Iowa jail for *Edwards/Jackson* purposes).

II.

THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT

By reinitiating interrogation and obtaining a confession after Minnick's right to counsel had attached, and after Minnick had requested and actually consulted with his attorney, the State also violated Minnick's Sixth Amendment rights. *See Michigan* v. *Jackson*, 475 U.S. 625 (1986). Deputy Denham's interrogation circumvented Minnick's right to "rely on counsel as a 'medium' between him and the State," *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985), and in this way as well contravened Minnick's Sixth Amendment right to counsel. This Court has consistently vacated convictions based on evidence obtained through a violation by the State of this fundamental right. *E.g.*, *Michigan* v. *Jackson*; *Maine* v. *Moulton*; *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964). It should do so here.

A. Minnick's Sixth Amendment Right To Counsel Had Attached Prior To Deputy Denham's Reinitiated Interrogation

As recognized by the Mississippi Supreme Court here (upon the concession of the Mississippi Attorney General (JA 68)), Minnick's right to counsel had attached under Mississippi law (JA 76). In Mississippi "[a] prosecution may be commenced . . . by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." Miss. Code Ann. § 99-1-7 (1972).[16] Thus, the issuance of an

16 The purpose of this Mississippi rule is to compensate for certain idiosyncracies of Mississippi procedure. As the Mississippi Supreme Court has observed, a holding whereby the right to counsel attached only at indictment or arraignment in Mississippi "would be wholly unworkable." *Page* v. *Mississippi*, 495 So. 2d 436, 440 n.5 (Miss. 1986) ("[w]ith grand juries meeting infrequently . . . , such an approach would have the right to counsel available to the accused only after many months had passed following arrest. We also take note of the practice in many of our counties of postponing arraignment in order to avoid the impact of our 270 day rule") (*citing* Miss. Code Ann. § 99-17-1 (Supp. 1985)). The court therefore held that the right attaches immediately upon arrest pursuant to process by a Mississippi court or at any time after the accused "has in fact secured the services of counsel." 495 So. 2d at 440. Any other rule, the court held, "would, simply put, have the effect of providing that the accused had the right to counsel only after it could be said with reasonable certainty that it would no longer do him any good, *i.e.*, after the point when any competent law enforcement officer would long since have obtained a confession or other inculpatory statement." *Id.* at 440 n.5.

arrest warrant constitutes the commencement of adversary proceedings in Mississippi, and hence represents the point at which the accused's right to counsel attaches. *Livingston* v. *Mississippi*, 519 So. 2d 1218, 1221 (Miss. 1988); *Page* v. *Mississippi*, 495 So. 2d 436, 439 (Miss. 1986); *Cannaday* v. *Mississippi*, 455 So. 2d 713, 722 (Miss. 1984).

The Justice Court of Clarke County, Mississippi issued warrants on May 6, 1986 for Minnick's arrest on the capital murder charges (JA 7). The warrants, based on affidavits setting forth the result of the Sheriff's investigation (JA 2-6), which was the principal responsibility of Deputy Denham (JA 26), specifically state that Minnick had been charged with capital murder and should be brought before the court to be examined on such charge (JA 7). That being so, the Mississippi court's conclusion that Minnick's Sixth Amendment right to counsel had attached under Mississippi law is in line with this Court's jurisprudence. For Sixth Amendment purposes, attachment occurs "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).[17] To determine when formal criminal proceedings

17 *See also Brewer* v. *Williams*, 430 U.S. at 398 ("right to counsel granted by the Sixth and Fourteenth Amendments means at least that a per-

begin for the purposes of initiating the Sixth Amendment guarantee, this Court looks to the criminal law of the state in question, *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977) (Sixth Amendment attached at point formal proceedings began under Illinois law), and should do so in this case.

B. Minnick's Confession Was Obtained Upon Police-Initiated Interrogation In Violation Of *Michigan* v. *Jackson*

The Sixth Amendment right to counsel rule enunciated by this Court in *Michigan* v. *Jackson* was abridged when Deputy Denham reinitiated interrogation after Minnick had clearly invoked his right to have counsel present (JA 16). On direct appeal, the Mississippi Supreme Court improperly analyzed Minnick's Sixth Amendment claim by failing to recognize the applicability of *Jackson*. Exacerbating this, the Mississippi Supreme Court ignored the holding of *Michigan* v. *Jackson* that there can be no waiver upon a police-initiated interrogation once the right to counsel has attached and has been asserted. *Michigan* v. *Jackson*, 475 U.S. at 635. *See also Michigan* v. *Harvey*, 110 S. Ct. at 1181; *Patterson* v. *Illinois*, 487 U.S. at 297-98. There should have been no further inquiry.

In *Michigan* v. *Jackson*, the Court extended the prophylactic rule of *Edwards* v. *Arizona* to interrogation by the State once the Sixth Amendment has attached.[18] Thus, once an

son is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him"); *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984) (that right to counsel does not attach until initiation of adversary judicial proceedings is consistent with purposes which right to counsel serves); *Estelle* v. *Smith*, 451 U.S. 454, 469-70 (1981) (Sixth Amendment right to counsel attached for psychiatric examination because adversary proceedings had commenced).

18 *Jackson* recognized the heightened need for the assistance of counsel in the Sixth Amendment context:

> "[A]fter a formal accusation has been made—and a person who has previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation." *Michigan* v. *Jackson*, 475 U.S. at 632.

accused's Sixth Amendment right to counsel has attached and he expressly requests counsel, the police are prohibited—in yet another deliberately bright-line test—from reinitiating interrogation. 475 U.S. at 635-36. The *Jackson* rule provides that "if police initiate interrogation after a defendant's assertion . . . of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Id.* at 636.[19] The prophylactic rule of *Jackson* is essential in the Sixth Amendment context precisely because once the accused has requested (and in Minnick's case consulted with) an attorney, and the entire prosecutorial resources of the State are being focused upon him, any waiver upon police-initiated interrogation is unlikely to be voluntary. *See Michigan* v. *Harvey*, 110 S. Ct. at 1180 ("suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations"). The *Jackson* rule serves to protect the accused's express desire to rely on counsel. *See Patterson* v. *Illinois*, 487 U.S. at 291.[20]

19 Recently, in *Michigan* v. *Harvey*, 110 S. Ct. 1176, 1179 (1990), this Court confirmed the *Jackson* bright-line rule, stating:

> "[T]he *[Jackson]* Court created a bright-line rule for deciding whether an accused who has 'asserted' his Sixth Amendment right to counsel has subsequently waived that right . . . . [W]e decided that after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid . . . ."

20 Federal courts have held that when an accused invokes his right to have counsel present, any subsequent police-initiated interrogation is a violation of the *Jackson* prophylactic rule. *E.g.*, *Wilson* v. *Murray*, 806 F.2d 1232, 1238 (4th Cir.), *cert. denied*, 484 U.S. 870 (1987) (even if statement was voluntary, "in the sense that word is normally used, it was obtained in contravention of the bright-line rule of *Michigan* v. *Jackson*: Once the right to counsel is invoked . . . subsequent waiver is invalid"); *United States* v. *Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988) ("if a defendant asserts his

This concern is echoed in this Court's recent observation that "[t]he prosecution must not be allowed to build its case

right to counsel . . . and the police subsequently initiate questioning regarding, those offenses, any waiver of defendant's right to counsel for that interrogation is invalid"). *See also United States* v. *Roberts*, 869 F.2d 70, 73 (2d Cir. 1989) ("the accused, after once having asserted his right to assistance of counsel, cannot validly waive that right in police-initiated questioning even with a validly presented and executed *Miranda* waiver form"); *Fleming* v. *Kemp*, 837 F.2d 940, 945, 947 (11th Cir.), *cert. denied*, 109 S. Ct. 1764 (1989) ("*Jackson* thus sets forth a 'bright-line' rule when statements must be suppressed. . . . 'if police initiate interrogation after a defendant's assertion, . . . , of his right to counsel, . . . any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid' ").

Similarly, state supreme courts have without hesitation vacated convictions upon finding a violation of *Jackson*. *E.g.*, *Bussard* v. *Arkansas*, 295 Ark. 72, 747 S.W.2d 71, 73 (1988) (under *Jackson*, the Sixth Amendment renders the defendant's confession inadmissible: "[i]nasmuch as the sheriff initiated communication or conversation with [defendant], [defendant's] subsequent waiver was invalid"); *Roper* v. *Georgia*, 258 Ga. 847, 375 S.E.2d 600, 602, *cert. denied*, 110 S.Ct. 290 (1989) (under *Jackson*, "[i]f police initiate questioning after the invocation of the right to counsel, any uncounseled waiver of that right is invalid"); *Heffner* v. *Indiana*, 530 N.E.2d 297, 303 (Ind. 1988) ("[a]fter the Sixth Amendment right to counsel is invoked, a waiver in response to police-initiated interrogation, even after additional *Miranda* warnings, is not sufficiently voluntary and intelligent to meet the constitutional mandate of the Sixth and Fourteenth Amendments"); *Iowa* v. *Newsom*, 414 N.W.2d 354, 359 (Iowa 1987) ("State's initiation of further interrogation of the defendant, when he was represented by counsel, affirmatively circumvented defendant's Sixth Amendment rights [and] [t]he police-initiated interrogation of defendant nullifies any waiver that defendant may have made"); *White* v. *Kentucky*, 725 S.W.2d 597, 598 (Ky. 1987) (vacating conviction in light of *Jackson* because police reinitiated interrogation after accused requested counsel and counsel was neither present nor notified); *West Virginia* v. *Tenley*, 366 S.E.2d 657, 660 (W. Va. 1988) ("[s]ince the accused asserted his right to counsel at the initial appearance and the police officers, by their own admission, subsequently initiated an interrogation, we find that the defendant's waiver of the right to counsel is invalid, as it violated the accused's Sixth Amendment right to counsel"). Other state courts have had no difficulty applying *Michigan* v. *Jackson*. *See, e.g.*, *Connecticut* v. *Jones*, 205 Conn. 638, 534 A.2d 1199, 1205-06 (1987) (the "sixth amendment prohibited the state from initiating interrogation or intentionally creating a situation likely to induce the defendant to make incriminating statements without the assistance of his counsel"); *Lovett* v. *Delaware*, 516 A.2d 455, 464 (Del.), *cert. denied*, 481 U.S. 1018 (1987) (recognizing *Jackson*'s rule that any waiver is invalid during police-initiated discussions after an accused invokes his right to counsel); *Martinez* v. *United States*, 566 A.2d 1049, 1054 (D.C. 1989) (once a suspect invokes right to counsel, the right is waived only when the defendant thereafter initiates conversation with police); *Kansas* v. *Hartfield*, 245 Kan. 431, 781 P.2d 1050, 1055 (1989) (recognizing *Jackson*'s rule that police may not reinitiate interrogation after an accused invokes his Sixth Amendment right to counsel).

against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially-created protections." *Michigan* v. *Harvey*, 110 S. Ct. at 1180.

It is clear from the record here that while being interrogated by the FBI agents Minnick invoked his right to counsel, not once, but twice (JA 16). He told the FBI agents that he would make a statement only when his lawyer was "present" (JA 16, 74). The FBI agents recognized this clear invocation by immediately ceasing their questioning of Minnick (*id.*).[21] A different police officer (here Deputy Denham) appearing subsequent to the accused's invocation of counsel is still barred by *Jackson* from reinitiating interrogation. *Michigan* v. *Jackson*, 475 U.S. at 633. *See* note 15 *supra*. The State abridged Minnick's Sixth Amendment right to counsel and violated *Jackson* by reinitiating interrogation after Minnick had asserted his right to counsel.

21 An accused's initial invocation of counsel is not vitiated by subsequent statements made during police-initiated interrogation. *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (*per curiam*). In fact, the invocation of counsel upheld in *Smith* was equivocal whereas Minnick's request left no room for doubt that Minnick wanted an attorney present. When informed that he had the right to consult with an attorney Smith replied, " 'Uh, yeah, I'd like to do that.' " *Id.* at 97. Even ambiguous or equivocal invocations of the right to counsel trigger the *Jackson* prophylactic rule. *E.g.*, *Towne* v. *Dugger*, 899 F.2d 1104, 1107-08 (11th Cir. 1990) (defendant's questions to officer of " 'what do you think about whether I should get a lawyer' " were "equivocal requests [for counsel] that require clarification before investigating officers initiate any further questioning"); *Smith* v. *Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) ("[w]hen the initial request is ambiguous or equivocal, all questioning must cease, except inquiry strictly limited to clarifying the request").

C. The State Was Required Under The Sixth Amendment To Recognize Minnick's Attorney As The Sole Medium Between Minnick And His Interrogators

The significance of counsel's presence once adversary proceedings have begun "[e]mbod[ies] 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself.' " *Maine* v. *Moulton*, 474 U.S. at 169 (*quoting Johnson* v. *Zerbst*, 304 U.S. 458, 462-63 (1938)).[22] Once adversary criminal proceedings have commenced against an individual, he has a right to have counsel present when the government interrogates him. *Maine* v. *Moulton*, 474 U.S. at 176; *Brewer* v. *Williams*, 430 U.S. 387, 401 (1977); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964). After the Sixth Amendment right to counsel has attached, the State must scrupulously honor the accused's choice to receive the assistance of counsel in dealing with the state. *Patterson* v. *Illinois*, 487 U.S. at 291 ("[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny"); *Maine* v. *Moulton*, 474 U.S. at 171 (the "Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance"). Thus where an agent of the prosecution seeks to interview an accused who is already represented, the general

22 This Court's rationale for guaranteeing the accused the presence of counsel at "critical stages" of the judicial proceedings finds its origin in *Powell* v. *Alabama*, 287 U.S. 45 (1932). In *Powell*, this Court underscored the need to provide the accused "with the guiding hand of counsel at every stage of the proceedings against him":

> "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id.* at 57.

This Court has many times echoed the "guiding hand of counsel" philosophy set forth in *Powell*. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. at 170 ("to deprive a person of counsel during the period prior to trial may be more damaging than the denial of counsel during the trial itself").

rule has been that "counsel should have been notified prior to [the] examination." *Estelle* v. *Smith*, 451 U.S. 454, 474 (1981) (Rehnquist, J., concurring). *See also Powell* v. *Texas*, 109 S. Ct. 3146, 3147 (1989) ("the Sixth Amendment right to counsel precludes such an examination without first notifying counsel"); *Satterwhite* v. *Texas*, 486 U.S. 249, 254 (1988) (holding that defense counsel must be given advance notice of examination).

As this Court held in *Michigan* v. *Jackson*, " '[t]he simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.' " 475 U.S. at 633 n.7. Evincing similar doubt about his ability to field questions from police, Minnick expressly told the FBI agents who appeared to interrogate him that he needed an attorney (JA 16). When the accused decides that he cannot deal with the police alone, the very purpose of having counsel present is to act as a medium between the accused and the authorities. *See Maine* v. *Moulton*, 474 U.S. at 170-71 n.7 (" 'the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen' " (*quoting Brewer* v. *Williams*, 430 U.S. at 415 (Stevens, J., concurring))). Although derived from the Fifth Amendment concern against self-incrimination, the bright-line rule of *Jackson* is rooted in the Sixth Amendment guarantee that an accused may rely on his counsel to act as such a medium. *Michigan* v. *Jackson*, 475 U.S. at 632.[23]

23 Respecting the accused's invocation of his Sixth Amendment right to counsel is even more essential where, as here (JA 46-47, 74), the police reinitiated interrogation of Minnick after he had established an attorney-client relationship.

As the brief of *amicus curiae* the Mississippi State Bar Association demonstrates, the interrogation of an accused without affording counsel an opportunity to be present appears to constitute an unethical form of trial preparation. Such violations have been noticed in opinions of this Court. *See, e.g.*, *United States* v. *Henry*, 447 U.S. 264, 275 & n.14 (1980) (noting the ethical rule in regard to an "impermissible interference with the righ. to the assistance of counsel"); *Maine* v. *Moulton*, 474 U.S. at 187-88 (Burger, C.J., dissenting) (noting that the Court referred to the ethical rule in *United States*

In analyzing the scope of the right to counsel, this Court has "ask[ed] what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." *Patterson* v. *Illinois*, 487 U.S. at 298. Once the Sixth Amendment has attached, counsel's role in a custodial interrogation setting is quite apparent.[24] It is proper for defense counsel to prevent the police from building a case solely out of the mouth of the accused. *Michigan* v. *Harvey*, 110 S. Ct. at 1180. A defense attorney imbued with the knowledge of the " 'intricacies of substantive and procedural criminal law,' " *Maine* v. *Moulton*, 474 U.S. at 170 (quoting *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984)), serves as armament against state interrogators.[25] Where the unassisted accused might otherwise acquiesce to police interrogation, "an attorney might well advise his client to remain silent in the face of interrogation by the police, and in doing so would be 'exercising [his] good professional judgment . . . to protect to the extent of his ability the rights of his client.' " *Fare* v. *Michael C.*, 442 U.S. at 721 (*quoting Miranda* v. *Arizona*, 384 U.S. at 480-

v. *Henry* to inform its determination of whether "the State deliberately circumvented counsel with regard to the 'subject of representation' "). *See also Patterson* v. *Illinois*, 487 U.S. at 301 (Stevens, J., dissenting); *Michigan* v. *Harvey*, 110 S. Ct. at 1189 n.12 (Stevens, J., dissenting); *Moran* v. *Burbine*, 475 U.S. at 464 n.53 (Stevens, J., dissenting). *But see Massiah* v. *United States*, 377 U.S. at 210-11 (White, J., dissenting).

24 *See United States* v. *Rodriguez*, 888 F.2d 519, 526 (7th Cir. 1989) (Easterbrook, J.) ("[the defendant] had become a litigant, and there are sound reasons for requiring one litigant to approach its adversary through counsel . . . . [The police] [t]rying to continue the conversation outside the ken of counsel in such circumstances endangers the prosecution as well as the defendant's legal entitlements").

25 Defendants like Minnick possess scant resources for deflecting the calculated maneuvers of state interrogators: " 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence.' " *Maine* v. *Moulton*, 474 U.S. at 169 (*quoting Powell* v. *Alabama*, 287 U.S. at 69).

81). In seeking to help the accused dispose of unwarranted charges, this Court has also emphasized the importance of counsel's presence in the event that the advisable course of action for the accused is to cooperate and give a statement. *E.g.*, *Fare* v. *Michael C.*, 442 U.S. at 719.

By stating to the FBI agents that if they came back on Monday, "he would make a more complete statement *with his attorney present*" (JA 16; emphasis supplied), Minnick articulated his desire to have counsel available during any interrogation. The Mississippi Supreme Court decision provides little protection for such a request, offering instead a rule that has no foundation in the decisions of this Court (JA 114-15, 117). The constitutional right to counsel is satisfied, according to the Mississippi ruling, so long as the police, before reinitiating interrogation, permit the accused to consult with counsel (JA 76). If this were truly the rule of *Edwards* v. *Arizona* and *Michigan* v. *Jackson*, police would be encouraged to engage in reinitiated interrogation every time the accused's lawyer closed the door on the way out of the prison. Presumably, such interrogation could occur immediately preceding trial or even during trial itself, so long as a new *Miranda* warning were offered each time the police entered the accused's cell. Given counsel's crucial role in protecting the rights of the accused, this Court has held that counsel must have a realistic opportunity to provide the necessary assistance to an accused who has expressed his intimidation in the face of the serried ranks of law enforcement. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. at 169; *Coleman* v. *Alabama*, 399 U.S. 1, 7 (1970) (plurality) (Op. of Brennan, J.). *See also United States* v. *Wade*, 388 U.S. 218, 226 (1967) ("the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial").

The decision of the Mississippi Supreme Court countenancing the reinitiated interrogation is at odds with this Court's Sixth Amendment jurisprudence, and, in and of itself, requires reversal.

CONCLUSION

For the foregoing reasons, the judgment of the Mississippi Supreme Court affirming Minnick's conviction should be reversed.

Dated: New York, New York
June 28, 1990

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

EDITOR'S NOTE

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No. 89-6332

In The Supreme Court of the United States

October Term, 1989

ROBERT S. MINNICK

PETITIONER

VERSUS

STATE OF MISSISSIPPI

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether, Once An Accused Has Expressed His Desire To Deal With Law Enforcement Officers Only Through Counsel, The Police May Reinitiate Interrogation In The Absence Of Counsel As Soon As The Accused Has Completed One Consultation With A Lawyer?[1]

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[1] This is the question presented as found in the petition for certiorari on which the Court granted certiorari. The question found in petitioner's brief on the merits differs markedly.

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NO. 89-6332

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ROBERT S. MINNICK,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENTS

This matter is before the Court on the Petition of Robert S. Minnick for a Writ of Certiorari to the Supreme Court of The State of Mississippi wherein the Court affirmed his two convictions of capital murder and sentences of death.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court affirming the two

convictions and death sentences is reported as Minnick v. State, 551 So.2d 77 (Miss.1988). The opinion is reprinted at JA 69.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3) challenging the constitutionality of his convictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified the pertinent constitutional provisions involved and set them forth in the Statutory Index to his brief.

STATEMENT OF THE CASE

A. Substantive Facts:

The facts of these brutal murders as reflected by the record in this case show that on April 25, 1986, Robert Minnick and James "Monkey" Dyess escaped from the

Clarke County, Mississippi, jail. Having successfully absconded from the jail, Minnick and Dyess hid in the woods in rural Clarke County overnight. The next morning they began making good their escape by walking out of the county. In the early afternoon, they approached the mobile home of Donald Ellis Thomas in rural Clarke County. They broke into the trailer to look for guns. As they were collecting the guns they found, Thomas returned home accompanied by Lamar Lafferty and his two-year-old son, Brandon Lafferty. Dyess jumped out of the trailer and shot Thomas in the back with a shotgun and then in the head with a pistol. Minnick shot Lamar Lafferty. They put two-year-old Brandon on the sofa in the living room of the trailer and continued collecting guns and ammunition.

While petitioner and Dyess were still inside, another car arrived containing two girls, Marty Thomas, Ellis Thomas' younger sister, and Desiree (B.B.) Beech. Petitioner went out and met them. He was carrying a pistol. Petitioner told the driver to give him the keys and get out of the car if they wanted to live. The petitioner marched the girls to the back of the trailer where they were met by a black man holding either a shotgun or a rifle. In the rear of the trailer the girls saw Ellis' parked truck and the body of Lamar Lafferty lying on the ground. Petitioner then took them inside the trailer where he made them lie on their stomachs and tied their hands and feet with haystring. During this time, Dyess was carrying guns out of the bedroom and two-year-old Brandon Lafferty was sitting on the sofa. Petitioner told Marty and

B.B. to tell the police that two black men had committed the crimes. He threatened to return and kill them if they did not tell this story. When all the guns had been removed from the house, petitioner and Dyess left.

The two girls then began attempting to get lose. Using their fingernails, they finally cut through the string which bound their feet and then found a knife in the kitchen to cut their hands loose. They looked out the window and saw that Ellis' truck was gone. Seeing no one about, they gathered up the baby and got in their car and went to a friend's house where they called the police.

Petitioner and Dyess apparently fled to New Orleans, Louisiana, as Ellis' truck which was recovered in Florida on May 6, 1986, had New Orleans parking tickets under the seat. Assistance of the New

Orleans Police Department was requested in an attempt to locate petitioner and Dyess. The search was fruitless as petitioner and Dyess had left New Orleans for Mexico by bus.

While in Mexico, petitioner and Dyess had a disagreement, and they parted company. Petitioner hitchhiked to California where he changed his name and procured a birth certificate and driver's license in the name of David Prokaska.

On August 22, 1986, petitioner was arrested in Lemon Grove, California. He was later transferred to the San Diego Police Department. The Mississippi authorities were contacted, and Deputy Denham was dispatched to California on August 24, 1986. While in the San Diego County jail, petitioner made a statement admitting his participation in this crime.

Petitioner waived extradition and returned to Mississippi with Denham.

B. **Procedural History:**

Petitioner was indicted for two counts of capital murder by the grand jury of the Circuit Court of Clarke County, Mississippi, on September 9, 1986. This indictment grew out of the robbery and murders of Lamar Lafferty and Donald Ellis Thomas. Minnick was also indicted as an habitual offender. A motion for change of venue was granted, and the trial was moved to Lowndes County, Mississippi. The trial began on April 6, 1987. The jury returned a verdict of guilty as charged to both counts of capital murder. At the conclusion of the sentence phase of the trial, on April 9, 1987, the jury returned a sentence of death for each capital murder conviction.

Minnick then took his automatic appeal to the Mississippi Supreme Court raising twenty-one (21) assignments of error. On December 14, 1988, the Mississippi Supreme Court, by an eight to one vote, affirmed the convictions and sentences of death in a written opinion. Minnick v. State, 551 So.2d 77 (Miss. 1988), JA 69. A timely petition for rehearing was filed by petitioner with the court below. A response by the state to the petition was called for by the Court. On October 25, 1989, the court below denied the petition for rehearing without further opinion. From the opinion affirming the convictions and sentences of death, petitioner brought a petition for certiorari to this Court. This Court granted certiorari on April 23, 1990.

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court correctly found that Edwards v. Arizona, 451 U.S. 477 (1981) allows law enforcement officers to reinitiate contact with a suspect once counsel has actually been consulted to determine if he is now willing to talk with the officers. If he is willing to talk and waives his right to have counsel present any statement may be used in a prosecution against him. Further, the court below correctly found that petitioner had freely, voluntarily and intelligently waived his Fifth Amendment right to counsel.

The question relating to the Sixth Amendment right to counsel was not presented in the petition for certiorari and should not be addressed. However, since the Sixth Amendment right to counsel

had not attached in the case at bar there has been no violation of the federal constitution.

ARGUMENT

I.

Whether, Once An Accused Has Expressed His Desire To Deal With Law Enforcement Officers Only Through Counsel, The Police May Reinitiate Interrogation In The Absence Of Counsel As Soon As The Accused Has Completed One Consultation With A Lawyer?

Petitioner claims in his brief on the merits that he was denied his rights under the Fifth and Sixth Amendments[2] when his confession given to a Mississippi deputy sheriff was admitted into evidence. He

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[2] Petitioner did not raise a claim under the Sixth Amendment in his petition for certiorari. The addition of this claim is a drastic expansion of the grounds upon which certiorari was granted and should not be allowed. While maintaining that issue should not be reached, respondent has addressed it in the alternative, infra.

claims that the introduction of the confession violates the teachings of Edwards v. Arizona, 451 U.S. 477 (1981) and Michigan v. Jackson, 475 U.S. 625 (1986). His basic contention is that once he has invoked his right to counsel he can never waive the right to have counsel present when he is interrogated. Respondent submits that neither the Fifth nor Sixth Amendment can be read so broadly as to make one a prisoner of his own rights. This is especially true when one has consulted with counsel on at least two occasions and then admits that he intended to talk to the officer to whom he gave the confession.

THE FIFTH AMENDMENT CLAIM

Petitioner asserts that the Fifth Amendment was violated when his incriminating statements made to Deputy J.C. Denham, a Clarke County, Mississippi,

deputy sheriff, were introduced into evidence at his trial for two capital murders. He bases his claim on the prophylactic rule created by this Court in Edwards v. Arizona, 451 U.S. 477 (1981) in which this Court held that when one in custody invokes his right to counsel under Miranda v. Arizona, 384 U.S. 436 (1966),[3] he ". . . is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485. Petitioner insists that counsel must be present at any substantive contact he has with the authorities from that point forward. The question here

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3 Miranda created the original prophylactic rule to insure that a suspect's right to remain silent was observed during the interrogation process.

turns on the implications of the phrase in Edwards which reads "until counsel has been made available" to the suspect.

The Mississippi Supreme Court found that Minnick, while being questioned by agents from the FBI, had invoked his right to counsel, and that invocation had been honored by those agents. The court below further found that Minnick was furnished counsel and actually consulted with counsel prior to the time he was interviewed by Deputy Denham. The court then concluded that the Fifth Amendment had been satisfied by Minnick's consultation with counsel. The Mississippi court held that since Minnick had actually consulted with counsel, "Edwards [sic] bright line

rule as to initiation does not apply." 551 So.2d at 83, JA 76.[4]

Petitioner contends that the Mississippi court misreads the precedent of this Court when that court states that the key phrase in Edwards is "until counsel has been made available to him." 551 So.2d at 83, JA 76. This quote from Edwards was used by the Court in Patterson v. Illinois, 487 U.S. 285, 291 (1988) (a Sixth Amendment case), Arizona v. Roberson, 486 U.S. 675, 678 (1983) and cited with emphasis in Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983) indicating that it is not mere dicta. A fair reading of

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[4] Other courts presented with this question have reached similar results. See, United States v. Hall, 905 F.2d 909 (6th Cir. 1990); United States v. Halliday, 658 F.2d 1103 (6th Cir.), cert. den., 454 U.S. 1127 (1981); State v. Grizzle, 293 S.C. 19, 358 S.E.2d 388 (1987), cert. den., 484 U.S. 1012 (1988); State v. Cody, 323 N.W.2d 863 (S.D. 1982).

Edwards allows the holding of the court below easily to be squared with the concerns of the Court in Edwards.

Reading Edwards, one finds it contains two situations in which the state may attempt to re-question a suspect after he has invoked his right to counsel. The first situation is when the suspect reinitiates the contact with the police after he has invoked his right to counsel. Oregon v. Bradshaw. The second situation under which the police can attempt the re-questioning of a suspect arises when the suspect requests counsel and is actually furnished with counsel. After the suspect has consulted with counsel, the police may reapproach the suspect to determine whether he is now willing to talk with the officers.

This second situation in Edwards has received little analysis since the

majority of the cases dealing with the prophylactic rule of Edwards rest on a factual background different from the one at bar. The familiar Edwards scenario is one in which proper warnings are given under Miranda, and the suspect invokes his right to counsel. After the right to counsel has been invoked, the police either continue to question the subject, ignoring his invocation, or they stop questioning the suspect, but reinitiate the questioning prior to furnishing of counsel. Therefore, the Court has never been presented with the factual situation which allowed it to address fully the second manner in which a suspect can be re-questioned under Edwards after the right to counsel has been invoked.

Looking to the purpose of the rule in Edwards, we note that the Court has stated that neither this nor the Miranda rule

from which it is derived, is required by the Fifth Amendment. Rather these rules are used as a prophylactic to protect the Fifth Amendment right to be free from the coercive effects of being in custody. Miranda.

The Court has held that when an accused reinitiates communication with the police prior to being furnished counsel, there is no violation of Edwards. In this scenario nothing has occurred to indicate that the coercive atmosphere of being in custody has been dissipated in any manner. However, when counsel has been furnished, and consultation has taken place between the suspect and counsel, the psychological pressures of being in custody are greatly reduced, if not completely removed. Consultation with counsel restores the equilibrium by removing the coercive elements of custody. If a suspect invokes

his right to counsel and is actually furnished counsel, he would have no reason to doubt that his request to have counsel present would again be honored, if made, at any reinitiated contact by the police. Further, after consultation with counsel, there is much less likelihood that he will be coerced into giving a statement against his interests than before such consultation. Clearly he will have been given advice concerning the implications of making statements that go far beyond that required by Miranda. This is why the court below found that Edwards allows contact to be reinitiated by the police after counsel has been made available to the accused. The Mississippi Supreme Court correctly held that the "bright-line rule as to initiation does not apply." JA 76.

The respondent does not suggest that the police should be allowed repeatedly to approach the suspect in an attempt to wear down his resistance. Oregon v. Bradshaw, at 1044, clearly condemned this particular behavior by police. Minnick was not repeatedly approached.

After a suspect has conferred with counsel the police should be allowed to reapproach him and inquire if he has talked with his attorney. If the suspect says yes, then the officer should give the suspect proper Miranda warnings and ask if he is now willing to speak with the officer. If the answer is no, the officer must then leave. If the answer is yes and the suspect talks with the officer, any statement made can then be used against the suspect. It goes without saying that the suspect can at any time during this re-questioning invoke his rights and

conclude the interview by refusing to answer further questions or requesting the presence of his attorney. The invocation of the right to silence or counsel must be honored as the opinions of this Court require. Obviously, the prisoner will with confidence assert these rights if he desires to curtail further questioning since he knows the police had previously honored his request prior to consulting with counsel.

The question then becomes: under what circumstances can this reapproach be made. Of course, if the officer has actual knowledge or objective indications[5] that the suspect has, in fact, consulted with counsel, the reapproach can be made.

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5 These objective indications include, but should not be limited to, jail logs and oral or written reports of fellow officers.

If these objective indicia do not exist,[6] an officer should be allowed to reapproach the suspect after a reasonable time and make inquiry as to whether or not he had spoken with counsel. If the answer is no, then the contact must cease. All this is stated with the full recognition that the state must still show that any resulting waiver was voluntarily, knowingly and intelligently made. Edwards, at 484; Johnson v. Zerbst, 304 U.S. 458 (1938). This procedure accommodates the language of Edwards. It likewise would give the Court a "bright-line" rule to govern this activity which still permits appropriate, non-coercive investigatory proceedings.

Alternatively, should the Court find that the reasoning of the court below

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6 An officers constructive knowledge of consultation with counsel is discussed, infra.

allowing reinitiation of questioning by the police is flawed, then we must look to the facts of the case sub judice. These facts show that Minnick actually invited the reinitiation of further conversations with the authorities and then freely and voluntarily waived his right to have his counsel present when he was interviewed by Deputy Denham.

The record shows that petitioner was arrested on August 22, 1986, by the Lemon Grove, California, police on two outstanding Mississippi warrants for capital murder and a federal warrant for interstate flight to avoid prosecution. Later that same day he was transferred to the San Diego County jail. Thereafter, the Mississippi authorities were notified of Minnick's arrest.

On August 23, 1986, two special agents of the Federal Bureau of Investiga-

tion interviewed petitioner in the San Diego County jail. Petitioner was fully advised of his rights according to Miranda. JA 14. Minnick stated that he was willing to answer some questions; however, he stated that he did not want to sign anything. He told the agents to ask whatever questions they wanted to ask. After telling the agents of his escape from the Clarke County jail and the events leading up to the murders of Thomas and Lafferty, Minnick hesitated. The agents reminded him that he did not have to answer questions without his attorney present. Minnick told the agents to "Come back Monday when I have a lawyer." He then stated that he would make a more complete statement with his lawyer present. He again told the agents to come see him on Monday as soon as he had a lawyer. JA 16. The FBI agents honored

this request and ceased questioning him about the crime.

After the FBI interview, Minnick was furnished an attorney and consulted with him. At the suppression hearing, Minnick stated:

> I talked to him two different times and -- it might have been three different times -- but I talked to him the day he told me the next day he would get the court order. He told me that first day that he was my lawyer and he was appointed to me and to not talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police -- I advised him of the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department. [Emphasis added.]

JA 46-47.

Late on Sunday, August 24, 1990, Deputy Denham arrived in San Diego from

Mississippi. The next morning he went to the San Diego County jail and asked to interview Minnick. Minnick was brought to an interview room in the jail. The first thing Denham did upon entering the room with Minnick was to advise Minnick of his Miranda rights. Petitioner told Denham that he understood his rights. After being read the waiver form, petitioner indicated that he understood that he had the right to have an attorney present at this interview. However, Minnick did not inform Denham that he had been interviewed by the FBI and that he had been furnished an attorney, nor did he request that his attorney be present at the interview with Denham.[7] JA 38, 56-57

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[7] Petitioner makes the assertion that Denham had a duty to inquire as to whether or not petitioner had requested or been appointed counsel. The record reflects that Denham apparently did just that. At the hearing on the motion in

Minnick informed Denham that he was not going to give a signed statement but that he wanted to talk with him. JA 29.

The conversation between Minnick and Denham began with Minnick telling Denham it had been a long time since he had seen him, and he had been expecting someone from Mississippi to show up in California

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limine the following colloquy took place:

> BY THE COURT: Did any of the people in California that you talked with say that the defendant wanted an attorney or advised the he would have an attorney?
>
> A. They advised that he would have an attorney with him during the extradition period whenever one would be needed.
>
> . . .
>
> CROSS EXAMINATION BY MR. GATES:
>
> Q. Do you know whether or not an attorney had been appointed for him?
>
> A. No. I don't.
>
> JA 56-57.

looking for him. Minnick then asked Denham how his family and friends in Mississippi were doing. Denham then asked if Minnick "would tell [him] what happened as far as them leaving the jail and what took place the next day." JA 31. From this chat about family and friends the conversation moved to the subject of Minnick's escape and then to the murders. During this conversation Minnick told Denham of his involvement in the murders of Thomas and Lafferty.

The intent to convey to Denham his participation in the murders is clearly expressed in Minnick's testimony during the hearing on his motion to suppress the confession.[8] Further, it is clear from this same testimony that Minnick under-

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[8] This same passage answers any question regarding petitioner's claim that he told the San Diego County officers that he did not want to see Denham.

stood his rights concerning self incrimination. The following colloquy took place between the prosecutor and Minnick at trial:

> Q. The truth of the matter is you know what your rights are and you are informed of your rights and you understood your rights, didn't you?
>
> A. I understood my rights and that's exactly why I told them that I wanted a lawyer and they was getting no kind of anything out of me for anything except when I talked to Jim Denham and stated the exact moment and the happening of the escape from the Clarke County Jail.
>
> Q. But, you continued to talk on to Mr. Denham about what happened in the murder, didn't you?
>
> A. You only have that down on paper. I'm denying that completely. I have already denied what he has down on paper because it's written up as "Robert Minnick advised so and so, Robert Minnick advised so and so", and there's no--nothing of anything to go along with it especially a signature and it states in one of the Mississippi law books that if one person

> does not freely and voluntarily give a statement to an official it is completely inadmissible--
>
> Q. Mr. Minnick, you're saying that you didn't even give the statement. Which is it? did you give the statement or did you not give the statement?
>
> A. No comment. I stand on the Fifth. [Emphasis added.]
>
> JA 52-53.

Minnick then refused to answer any further questions about his statement asserting his Fifth Amendment right against self-incrimination, refusing even to admit that he made any further statement to Denham.[9] JA 53-55.

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[9] It is apparent from the record that Minnick took great delight in second guessing his lawyers and expounding on his knowledge of the law. His familiarity with the law is apparent from statements made about former attorneys. He quipped that his lawyer on an earlier conviction was "not any good." He boasted that "[a]fter arriving at prison and studying law for my own person in the law library" he could have represented himself before a jury and gotten acquitted of the charges. JA 51.

Denham's testimony during the suppression hearing reveals that he had no personal knowledge at the time of the interview that Minnick had been interviewed by the FBI nor that Minnick had invoked his right to counsel during that interview. JA 37-38.[10] Denham testified that Minnick never asked to speak to an attorney while he was being questioned. JA 56. Denham stated that he did not know that an attorney had been appointed for Minnick at the time he

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10 Minnick contends that Denham had a copy of the FBI interview report prior to the time he interviewed the petitioner. This fact is refuted by the transcript. Denham's interview took place at 8:40 a.m. on August 25, 1986. JA 10, 28. The notations on the FBI report reflect that the report was dictated on August 24, 1986, and not transcribed until August 25, 1986. This transcript could hardly have been in Denham's hands prior to 8:40 in the morning. Further, Denham was informed of the Saturday FBI interview with petitioner only after his Monday interview. JA 37.

questioned him, and Minnick did not so inform him. JA 56-57.

Respondent recognizes that the FBI report states that Minnick told the agents to come back Monday when he had an attorney and that he would make a more complete statement with his attorney present. However, we also note that Minnick stated in his testimony at the suppression hearing that he intended to talk with Denham. Therefore, the fact that counsel was not present when Denham interviewed petitioner cannot be determinative of the issue. Using the reasoning of the Court in Michigan v. Harvey, 494 U.S. ___, 110 S.Ct. 1176, 108 L.Ed. 293 (1990), we submit that petitioner exercised his prerogative to waive his right to counsel without further consultation with or notice to his attorney. The Court stated in Harvey:

In other cases, we have explicitly declined to hold that a defendant who has obtained counsel cannot himself waive his right to counsel. See **Brewer**,, 430 U.S., at 405-406 ("The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as we do, that he did not"; **Estelle v. Smith**, 451 U.S. 454, 471-472, n. 16 (1981) ("we do not hold that respondent was precluded from waiving this constitutional right [to counsel]. . . . No such waiver has been shown, or even alleged, here"). A defendant's right to rely on counsel as a "medium" between the defendant and the State attaches upon the initiation of formal charges, **Moulton**, 474 U.S. at 176, and respondent's contention that a defendant cannot execute a valid waiver of the right to counsel without first speaking to an attorney is foreclosed by our decision in **Patterson**. Moreover, respondent's view would render the prophylactic rule adopted in Jackson wholly unnecessary, because even waivers given during defendant-initiated conversations would be per se involuntary or otherwise invalid, unless counsel were first notified.

> Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising free will. To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be "to imprison a man in his privileges and call it the Constitution." **Adams v. United States ex rel. McCann**, 317 U.S. 269, 280 (1942). [Emphasis the Court's.]
>
> 108 L.Ed.2d at 304.

While Harvey is a Sixth Amendment case, the reasoning is compatible with the situation at bar.

This is not a case where petitioner was being badgered by the police to change his mind about waiving his rights to counsel prior to counsel being furnished.[11] Quite the contrary, Minnick

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11 As noted above, this type behavior on the part of the police has been condemned by this Court in Edwards and Bradshaw, 462 U.S. at 1044.

invited the authorities to come and speak with him again, and Deputy Denham accepted his invitation.

Petitioner's argument that he misunderstood his rights and therefore did not voluntarily waive them is also unavailing.[12] The record reflects that petitioner refused to sign a waiver of his rights, refused to sign the statement he made and even asked if the interview was being taped. Petitioner here argues that these facts indicate that his misunderstanding of his rights removed the free and voluntary character of his waiver of counsel. In Connecticut v. Barrett, 479 U.S. 523 (1987), this Court found a similar argument unpersuasive. The Court said:

> We also reject the contention that the distinction drawn by Barrett between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes. This suggestion ignores Barrett's testimony--and the finding of the trial court not questioned by the Connecticut Supreme Court--that respondent fully understood the Miranda warnings. These warnings, of course, made clear to Barrett that "[i]f you talk to any police officers, anything you say can and will be used against you in court." App. at 48A. The fact that some might find Barrett's decision illogical is irrelevant, for we have never "embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." **Elstad**, 470 U.S. at 316; **Colorado v. Spring**, post, p 564 (1987). [Footnote omitted.]
>
> 479 U.S. at 530.

Petitioner clearly stated in the suppression hearing that he intended to talk with Denham and tell him about the escape. JA 52. It is apparent that he thought he

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12 See footnote 9, supra.

could tell the whole story of his nefarious deeds and then decide which parts could be used against him. By not signing the waiver of rights form, by refusing to allow the interview with Denham to be recorded, by refusing to sign a statement, and by pleading his Fifth Amendment right against self-incrimination at the suppression hearing, Minnick thought he could restrict the state's use of his statement to that portion dealing with the escape from the Clarke County jail. This misunderstanding, if it was one, led Minnick to make inculpatory statements to Denham regarding the murders of Thomas and Lafferty in Mississippi. However, this does not destroy the voluntary character of Minnick's whole statement. The full statement could properly be used against him. Barrett, supra.

The respondent acknowledges that the rule is that the knowledge of one officer in an agency concerning a defendant's invocation of his right to counsel or silence is imputed to everyone who deals with that defendant. United States v. Scalf, 708 F.2d 1540, 1544 (10th Cir. 1983) (Once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspect.) This rule is often draconian in its application, especially in a situation as here where officers of three separate sovereigns are involved. Here the record does not reflect whether the FBI Agents told the San Diego County jailers that Minnick invoked his right to counsel. It is clear that Denham had no actual knowledge of the invocation of the right to counsel, and he was not informed by the

San Diego officers or the FBI of this fact. Only after his meeting with Minnick and only after receiving the FBI report did Denham become aware of the prior invocation of the right to counsel. However, Denham acted within the law, having read the Miranda rights to Minnick, he followed the procedures as outlined in that case. It is clear from Minnick's testimony that he wanted to speak with Denham in spite of this invocation of the right to counsel made to the FBI agents.

Conversely, if the state is to be bound by the imputation of the knowledge of invocation of rights of which it has no actual knowledge, petitioner's invitation to the FBI to return and talk with him must also be imputed to the state. Cf. Scott v. United States, 436 U.S. 128, 137-38 (1978) (The fact that the officer does not have the state of mind hypothecated by

the reasons which provide legal justification for the officer's action does not invalidate the action taken so long as the circumstances, viewed objectively, justify that action.) The FBI agents had actual knowledge of petitioner's invitation to return on Monday; thus, this knowledge is imputed to Denham. Therefore, Denham's conversation with Minnick was invited by petitioner through the inverse of the same imputation rule. Petitioner initiated the conversation with Denham when he invited the FBI to return on Monday.

Edwards allowed Denham to reapproach Minnick after he had been allowed to consult with counsel and inquire whether or not he would submit to further questioning. Minnick could have told Denham that he would not talk with him or that he wanted his counsel present, both rights that he knew that he had. Therefore, the

Mississippi Supreme Court correctly found that the contact Denham made with Minnick was permissible under Edwards, and the waiver of the right to counsel at that point was free and voluntary.

THE SIXTH AMENDMENT CLAIM

Petitioner did not raise a claim under the Sixth Amendment in his petition for certiorari; therefore, this Court should not consider this claim presented for the first time in the Brief for Petitioner.[13] This Court held in General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175 (1937):

> One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue. Crown Cork & Seal Co. v. Ferdinand Gutmann Co.__decided this day [304 U.S. 159, ante]. Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ.
>
> 304 U.S. at 179.

Likewise, the rules of this Court do not allow a party to raise in the brief on the merits ". . . additional questions or change the substance of the questions already presented" in the petition for writ of certiorari. Sup. Ct. Rule, 24.1(a). Respondent submits the Sixth Amendment question was not presented in the petition for writ of certiorari; and, therefore, the question should not be reached or addressed.

While still maintaining that petitioner's Sixth Amendment claim was not presented in the petition for certiorari and therefore is not before the Court,

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13 In his petition for certiorari petitioner stated, "In the context of the Sixth Amendment right to counsel, this question would obviously not arise." Petition at 11. Clearly the petition for certiorari was concerned only with the Fifth Amendment claim.

respondent feels compelled to address the claim alternatively.

The respondent would first submit that petitioner's right to counsel had not attached under federal law at the time he gave his incriminating statement. We recognize that petitioner relies heavily on the language in the opinion below stating:

> Minnick argues further that his Sixth Amendment right to counsel under Mississippi law had attached by the time of the Denham interview since warrants for his arrest had issued; the state does not dispute this. See, e.g., **Livingston v. State**, 519 So.2d 1218, 1221 (Miss. 1988).

551 So.2d at 83, JA 76.

The key phrase here is "under Mississippi law." The Mississippi Supreme held in Livingston v. State, 519 So.2d 1218 (Miss. 1988), that the right to counsel in the Sixth Amendment sense attaches at the time

an arrest warrant is issued. This holding in Livingston is based on Miss. Code Ann. § 99-1-7 (1972) and the opinion in Cannaday v. State, 455 So.2d 713 (Miss. 1984). Miss. Code Ann. § 99-1-7 (1972) reads:

> A prosecution may be commenced, with the meaning of section 99-1-5 by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.

When we look to Miss. Code Ann. Section 99-1-5 (1972) we find that it is a statute dealing with statute of limitations for prosecutions for certain crimes. This does not in any manner involve the Federal Sixth Amendment right to counsel. Even more revealing is the language of the court below in Cannaday. The court held:

> Secondly, defense relies upon the Sixth Amendment to the United States Constitution providing that "(I)n all

criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." The Sixth Amendment rights are applied to state prosecutions through the Fourteenth Amendment of the United States Constitution. **Watson v. State**, 196 So.2d 893 (1967), **Powell v. Alabama**, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (9132).

Mississippi jurisprudence has the same constitutional, and statutory provisions, and rules guaranteeing these same rights. Mississippi Constitution Art. 3, Section 26 provides that "(I)n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, . . . and he shall not be compelled to give evidence against himself; . . . " Also, see Mississippi Code Annotated section 99-15-115 (1972) and Mississippi Criminal Rules of Procedure, Rule 1.03, 1.05.

Since the Mississippi jurisprudence provides an adequate and equal basis for these constitutional rights, we base our opinion herein on Mississippi law, notwithstanding the fact that reference is made to federal cases. The federal cases are used for the purpose of guidance, but Mississippi jurisprudence compels the

result. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). [Emphasis added.]

455 So.2d at 722.

Finally, the citation of Page v. State, 495 So.2d 436 (Miss. 1986) likewise falls short of supporting petitioner's position. Page clearly rejects federal law as the basis of its decision. In footnote five the Court states:

> We are very much aware of the fact that a number of recent federal cases have held that the right to counsel secured by the Sixth Amendment to the Constitution of the United States is available only after the initiation of judicial criminal proceedings, i.e., indictment and arraignment. . . . [W]e reject the federal approach and for purposes of today's decision rely exclusively upon state law. [Emphasis added.]

495 So.2d at 440.

Since the Mississippi Constitution does not so conveniently divide the parallel rights found in the Fifth and Sixth

Amendments of the federal constitution it is often easier to speak of the state constitutional right with reference to the corresponding federal right. Clearly that is what was done here by the state co rt as the Sixth Amendment right to counsel had not attached according to federal law.[14] Mississippi law enforcement officials and prosecutors must deal with this broader reading of the right to counsel under state law. This Court has held that a state court is free to read its own constitution more broadly than this Court reads the United States Constitution. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). However, a broader reading by a

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[14] Likewise, the admission that the Sixth Amendment right had attached, found in the respondent's brief on direct appeal to the court below, is prefaced by the statement "under Mississippi law." JA 68.

state court is not binding on this Court. Further, this Court is not bound by a state law interpretation of federal law that conflicts with established precedent of this Court. This Court is the final arbiter of when the Sixth Amendment right to counsel attaches. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

We know that the federal Sixth Amendment right attaches when adversary judicial criminal proceedings are initiated by the state. Kriby v. Illinois, 496 U.S. 682, 689 (1972) (plurality opinion). In Mississippi an arrest warrant is issued in an ex parte proceeding as it is in the federal system. Miss. Code Ann. §99-3-21 (1972). The issuance of an arrest warrant is not a commitment by the state to prosecute the person arrested. The prosecutorial forces of the State of Mississippi are not

brought to bear on petitioner simply by the issuance of an arrest warrant. He is not being confronted by the full panoply of the prosecutorial system at this stage of the proceedings. The issuance of an arrest warrant has never been held to be the trigger that activates the federal Sixth Amendment right to counsel. United States v. Gouveia, 467 U.S. 180, 190 (1984). Minnick's federal Sixth Amendment right to counsel had not attached at the time that Denham questioned him as the mere issuance of an arrest warrant is insufficient to implicate that right.

There has been no violation of the federal constitution cognizable by this Court.[15]

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[15] Even if the Sixth Amendment were somehow found to apply to this case, the trial court found that Minnick had knowingly, intentionally and voluntarily relinquished his right to counsel. This finding was upheld by the court below.

CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court affirming the convictions and sentences of death in this case should be affirmed.

Respectfully submitted,
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August 27, 1990

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551 So.2d at 85, JA 80. This court has held that informing a suspect of his rights according to Miranda are sufficient to place him on notice of his Sixth Amendment right to counsel. If an indictee then waives his right to counsel after being informed of these rights, that waiver is sufficient to allow use of any statement he makes so long as it is free and voluntary. Patterson v. Illinois, 487 U.S. at 292, 299-300. Even where counsel has been obtained by a suspect, the right to have counsel present can be waived. Brewer v. Williams, 430 U.S. at 405-406. The court below properly found that Minnick waived his Sixth Amendment rights under state law.

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief for Respondents to the following:

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This the 27th day of August, 1990.

Marvin L. White, Jr.

MARVIN L. WHITE, JR.

No. 89-6332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

At the core of this appeal is the right of an accused to have his counsel present at a custodial interrogation when he has asked that counsel be there. That such a request was made by Robert Minnick is indisputable: the FBI report itself quotes Minnick as requesting his lawyer's *presence* at any reinterrogation (Minnick "stated that he would make a more complete statement [on Monday] with his lawyer present" (JA 16)).[1] Nor can any serious argument be offered that Minnick

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[1] Mississippi seeks to transform Minnick's statement to the FBI that he would speak further with them with his counsel present into an open-ended "invitation" to the "authorities to come and speak with him again [which] Deputy Denham accepted" (Brief of Respondent, "Miss. Br.," at 34). As Mississippi recognizes elsewhere, however, the "invitation" was predicated on having Minnick's attorney present (Miss. Br. at 23).

reinitiated discussions with the authorities: the record is plain, and the Mississippi Supreme Court has held, that "[w]hen Denham arrived at the jail, the jailers told Minnick that he would have to go down and talk with Denham" (JA 74; *see also* 45).

Because it is undeniable that Minnick: (a) asked for counsel when the FBI interrogated him (JA 15-16); (b) stated that he would speak again with the authorities "with his lawyer present" (*id.*); and (c) was required to meet with Deputy Denham without his counsel present after his jailers told him that he was obliged to "talk" with Denham (JA 45, 47, 74), the question thus posed is whether, under these circumstances, it can possibly be deemed consistent with this Court's ruling in *Edwards v. Arizona*, 451 U.S. 477 (1981) for inculpatory statements allegedly made by Minnick to Deputy Denham to have been introduced against him.

Both Mississippi and the United States, as *amicus curiae*, seek to deal with this question by avoiding it. Mississippi (and the Mississippi Supreme Court ruling it defends) urges that *Edwards* should be read to provide that the police are only required to afford the accused the chance to "consult" with counsel before the State is free to reinitiate interrogation (Miss. Br. at 11-18). The United States' approach is to frame the ultimate issue before the Court as whether the rule of *Edwards* should be "extended" to prohibit the police from reinitiating contact with an accused whose invocation of his right to counsel has been honored (Brief of the United States as *Amicus Curiae* Supporting Respondent, "U.S. *Amicus* Br.," at 8). But the issue here is the far simpler one of whether an accused who has indicated his desire to deal with the police only through counsel – and specifically requested the *presence* of counsel – may be reinterrogated without counsel actually being present and have statements then extracted from him used against him.

The negative answer to that question is not only contained within *Edwards* itself, but also in *Miranda v. Arizona*, 384 U.S. 436 (1966), and has frequently been reiterated in decisions of this Court. In response, the United States argues for a radically new rule – one unsupported by citation to any decision of this Court – that eradicates much of the painstaking work of this Court to assure the implementation of the protections afforded an accused by the Fifth Amendment. The rule would provide that after

an accused invokes his right to counsel and interrogation has ceased, the police may then return – without notice or invitation – to inquire whether the accused has spoken with counsel; if he has, the police may "engage in a second interview if, after again being advised of his/her *Miranda* rights, the accused agrees to waive these rights and speak with the [authorities]" (U.S. *Amicus* Br. at 2 n.1, quoting FBI, *Legal Handbook for Special Agents* § 7-4.1(5) at 84 (1990); *see also* U.S. *Amicus* Br. at 16).[2] There simply is no basis in the precedents of this Court for such a rule. Nor is there any sound policy reason requiring adoption of the United States' proposal to reconsider and re-write the body of the Fifth Amendment precedents in this area.

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[2] We respond throughout this brief to the substantive position of the United States. We note, however, that because Minnick had an attorney, the reinitiated interrogation of Deputy Denham is inconsistent even with the requirements set forth in the FBI's *Legal Handbook for Special Agents:*

> *"If the person being interviewed has already retained counsel, the warning must be that the accused has a right to have that specific person present. Persons under arrest should be specifically asked as to whether counsel has been retained or appointed.* When showing on the FD-395 or the FD-302 (if form is not used) that the warning was given, it must clearly appear that the interviewing Agent advised the accused of his/her right to the presence of his/her counsel already retained, and that the accused voluntarily waived the presence of that person." (*Handbook*, § 7-3.4, at 82.01; emphasis supplied)

Notwithstanding Mississippi's assertion (Miss. Br. at 25 n.7), Minnick was not asked if he had counsel and was not advised that he had a right to have *his* counsel present at the reinterrogation conducted by Deputy Denham (JA 28-29). In fact, Minnick's uncontroverted testimony was that he was told by his jailers that his attorney was "nothing" (JA 47) and that he was obliged, against his will, to meet with and "talk" to Deputy Denham (JA 45, 47).

We also note that, notwithstanding the language in the *Handbook* cited by the United States, the FBI has demonstrated its ability to adhere to the constitutionally compelled norms required by *Edwards*. In *United States v. Halliday*, 658 F.2d 1103, 1104 (6th Cir.), *cert. denied sub nom, Frank v. United States*, 454 U.S. 1127 (1984), for example, a case cited by the United States in support of its new rule, the FBI asked counsel's permission to reinterview his client. In *United States v. Bentley*, 726 F.2d 1124, 1126 (6th Cir. 1984), the FBI Agent contacted the accused's counsel to "arrang[e] a time" to interview the accused. And in this case, the FBI discontinued its interrogation of Minnick when he stated that he wanted counsel's presence and it did not reinitiate contact with him (JA 16).

Mississippi and the United States choose avoidance in response to Minnick's argument that Deputy Denham's interrogation violated his Sixth Amendment rights. The suggestion that Minnick may not argue that his conviction and death sentence offend the Sixth Amendment because the Sixth Amendment was not specifically cited in Minnick's "Question Presented" in his petition for a writ of *certiorari* is not only based upon a tortured misreading of the question — which refers by name to no amendment but fairly encompasses both the Fifth and Sixth Amendments — but wholly ignores Mississippi's previously quite lucid understanding of the scope of the Question Presented in the petition for *certiorari* as raising both Fifth and Sixth Amendment issues.

As for the merits, Mississippi attempts to retreat from its earlier admission — as well as the plain holding of its Supreme Court — that Minnick's Sixth Amendment right to counsel had attached prior to the time of Deputy Denham's interrogation (JA 68, 76). There is no basis for Mississippi's change of position and thus no basis at all for avoiding the force of *Michigan v. Jackson*, 475 U.S. 625 (1986), which requires reversal of the ruling below.

ARGUMENT

I. MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

A. *Edwards v. Arizona* Controls This Case And Mississippi's Interpretation Does Not Comport With This Court's Precedents

This Court has consistently held that an indispensable safeguard for the protection of the Fifth Amendment privilege against compelled self-incrimination is the right to have counsel *present* at any custodial interrogation.[3] No decision of this Court supports

[3] *E.g.*, *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) ("[t]he rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that '[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present'"); *Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (accused's right to communicate with police only through counsel is the "essence of *Edwards* and its progeny"); *Michigan v. Jackson*, 475 U.S at 629 ("[t]he Fifth Amendment protection against compelled self-incrimination provides the right to *(Footnote continued)*

the argument that, once an accused facing custodial interrogation has invoked the right to counsel and sought counsel's presence, anything other than counsel's actual presence is sufficient to protect the Fifth Amendment privilege.[4]

Deputy Denham's reinterrogation of Minnick after Minnick invoked his right to have counsel present violated the *Edwards* rule. To avoid *Edwards*' bright-line proscription, Mississippi must

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counsel at custodial interrogations"); *Moran v. Burbine*, 475 U.S. 412, 423 n.1 (1986) (Fifth Amendment right to counsel requires police to "honor his request that the interrogation cease until his attorney is present"); *Shea v. Louisiana*, 470 U.S. 51, 52 (1985) ("[i]n *Edwards v. Arizona*, . . . this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation — without counsel present — after he requested an attorney"); *Solem v. Stumes*, 465 U.S. 638, 646 (1984) ("[b]efore and after *Edwards* a suspect had a right to the presence of a lawyer"); *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983) (plurality) (Op. of Rehnquist, J.) ("[i]n *Edwards* . . . [w]e held that subsequent incriminating statements made without his attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments"); *Edwards v. Arizona*, 451 U.S. at 485 ("*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' Our later cases have not abandoned that view"); *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (Fifth Amendment privilege against compelled self-incrimination includes the *Miranda* warning "'that he has the right to the presence of an attorney'"); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) (*Miranda* held that "'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege'"); *Michigan v. Mosley*, 423 U.S. 96, 104 n.10 (1975) (*Miranda* "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney'"); *Miranda v. Arizona*, 384 U.S. at 474 ("[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present").

[4] Minnick's conviction may be reversed without addressing the reconsideration of the *Edwards* rule urged by Mississippi and the United States. Itself sufficient is the Mississippi Supreme Court's factual finding that when Deputy Denham appeared at the San Diego jail "the jailers told Minnick that he would have to go down and talk" (JA 74; *see also* 45). *Edwards v. Arizona*, 451 U.S. at 490 (Powell & Rehnquist, JJ., concurring) (when a suspect is "taken from his cell against his will and subjected to renewed interrogation . . . it clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel"). This critical fact of coercion is never adverted to by Mississippi or the United States.

demonstrate that Minnick "initiated" communications with the authorities. 451 U.S. at 485, 486 n.9. That Mississippi simply cannot do in a case in which Deputy Denham went to the San Diego County jail to interrogate Minnick who, in turn, was told by his jailers (as the Mississippi Supreme Court concluded) "that he would have to go down and talk to Denham" (JA 74; *see also* 45; Miss. Br. at 25). This case is thus in stark contrast to ones in which the police and the accused were already in the other's presence and difficult issues were raised as to who "reinitiated" communications. *Compare Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality) (Op. of Rehnquist, J.) (conversation occurred after the accused invoked his right to counsel while being transferred from the police station and after his attorney gave the police permission to do so).

Here the record supports no conclusion other than that Deputy Denham reinitiated the interrogation of Minnick and that in doing so he violated Minnick's Fifth Amendment rights.[6]

B. The New Rule Proposed By The United States Is Without Independent Support And Would Eliminate Bright-Line Rules Of This Court

Rather than accept the outcome prescribed by *Edwards*, the United States proposes a new Fifth Amendment prophylactic rule based on unsupported assumptions. The United States urges this Court to read the heart out of *Edwards* by permitting the police to reinitiate interrogation of an accused who has specifically requested the presence of counsel but has, when the reinterrogation

[6] Given *Edwards*, issues of waiver need not be addressed by this Court. Contrary to Mississippi's assertion (Miss. Br. at 9), however, there was no holding below that Minnick made a knowing, intelligent and voluntary waiver of his Fifth Amendment rights (JA 75-76). Mississippi argues that Minnick's subjective intent *not* to waive his rights (as illustrated by his mistaken belief that if he did not sign a waiver of rights form nothing he said could be used against him (Miss. Br. at 35-36)) should be translated into a finding that an effective waiver was made (Miss. Br. at 31-36). The law is to the contrary. *E.g., Edwards v. Arizona*, 451 U.S. at 482 ("waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege" to be decided in each case depending on the subjective characteristics and intent of the accused); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver requires "an intentional relinquishment or abandonment").

occurs, previously consulted with counsel who is not actually present. Once an accused has merely spoken with counsel, the United States suggests, "the potentially coercive pressures of custodial interrogation are dissipated" (U.S. *Amicus* Br. at 6).

The assumptions underlying the United States' proposed new rule have been previously made to and rejected by this Court. Counsel's presence, this Court has repeatedly emphasized, is essential to protect the Fifth Amendment privilege against self-incrimination.[6] This Court has recognized that the custodial environment "is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation." *Miranda v. Arizona*, 384 U.S. at 457.[7] The coercive atmosphere of custodial interrogation exists therefore not because an accused has not spoken with counsel but because counsel is not present to offset the threatening power of the state. *See Rhode Island v. Innis*, 446 U.S. 291, 299 (1980). This Court long ago recognized the significant difference between mere consultation and the presence of counsel in safeguarding the Fifth Amendment privilege:

> "Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel

[6] Minnick's clear declaration that he wanted his attorney "present" (JA 16) for any interrogation is not subject to interpretation. An accused's invocation of his *Miranda* rights must be read literally both by the police and by reviewing courts and the plain meaning of the accused's invocation governs. *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) ("[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous").

[7] *Illinois v. Perkins*, 110 S. Ct. 2394, 2397 (1990), reiterated that custodial interrogations produce "'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely'" (*quoting Miranda v. Arizona*, 384 U.S. at 467). *Perkins* recognized that the essential ingredient of "police-dominated atmosphere" is "'privacy – being alone with the person under interrogation,'" *id. (quoting Miranda v. Arizona*, 384 U.S. at 449), because "[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will." 110 S. Ct. at 2397.

present during any questioning if the defendant so desires." *Miranda v. Arizona*, 384 U.S. at 470 (citation omitted).[8]

No decision of this Court suggests that the inherently coercive atmosphere of custodial interrogation is dissipated by prior consultation with counsel. Minnick was immersed in a coercive atmosphere, his previous request for his counsel's presence ignored (JA 45, 74), his counsel demeaned by his jailers (JA 47), and his express desire not to meet with Deputy Denham given no effect (JA 45). To suggest, as the United States does (U.S. *Amicus* Br. at 6, 9, 10, 11, 13), that the coercive atmosphere of interrogation is dissipated in these circumstances simply because Minnick previously met with counsel and was given a new set of *Miranda* warnings disregards the very concerns which motivated this Court to establish the *Edwards* bright-line rule.[9]

Adoption of the new rule proposed by the United States would hardly provide the lower courts or the police with a "bright-line" rule. No concrete limitations are proffered and nothing in the rule supplies a basis for judging the appropriateness of the number of reinitiations, the conduct of the officers, or the extent of the coercion. Under this rule the question of how many times and the circumstances under which the prosecution may seek to extract a statement is unclear, and would predictably be the subject of new and extensive *in limine* hearings — *"Minnick"* hearings, we suppose — on an issue which now requires practically none. Significantly, this Court has consistently held that the probability of an effective waiver in the absence of counsel is slim once the accused has explicitly stated his desire to have counsel present. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring) ("the accused having expressed his own

[8] *See also Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (*Miranda* and *Edwards* prevent "government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment"); *Fare v. Michael C.*, 442 U.S. at 719 (right to have counsel present is based on the "special ability of the lawyer to help the client preserve his Fifth Amendment rights").

[9] This Court has specifically stated that new *Miranda* warnings will not "'reassure' a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammeled." *Arizona v. Roberson*, 486 U.S. at 686.

view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a decision without counsel's presence may properly be viewed with skepticism"). Few admissible confessions are, therefore, likely to result from the proposed new rule.

The rule offered by the United States would thus eviscerate not only an accused's right to the presence of counsel but the benefits of the bright-line rules establishing the prophylaxis of protections for an accused's Fifth and Sixth Amendment rights.[10] Those benefits have been genuine. The *Edwards* rule, as routinely applied by the police and the courts, has had all the predictable advantages of a bright-line rule.[11] To our knowledge, since *Edwards* was decided the precise factual scenario in this case has arisen in approximately one reported decision a year.[12] The police have

[10] *E.g., Arizona v. Roberson, supra* (applying *Edwards* bright-line rule to separate investigations); *Michigan v. Jackson, supra* (applying *Edwards* bright-line rule to the Sixth Amendment); *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (*per curiam*) (accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of the initial request).

[11] The United States takes issue with the statement that "'[o]ther courts have generally agreed that *Miranda* and *Edwards* forbid any state-initiated interrogation without counsel present once the accused has requested that counsel act as a medium between him and the government'" (U.S. *Amicus* Br. at 14, *quoting* Pet. Br. at 15 n.12). Minnick has, however, consistently characterized these statements as dictum (*see* Petition for Certiorari at 7 n.6; 8 n.8; 9 n.12; 11 n.13), which makes them no less persuasive as statements of the courts' holdings. This precise issue has *not* arisen frequently for the very reason that law enforcement officers have applied the rule of *Edwards* and *not* reinitiated interrogation after the accused has invoked his right to counsel.

[12] The parties more or less agree that these cases are, on one hand, *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987); *Roper v. Georgia*, 258 Ga. 847, 375 S.E.2d 600, *cert. denied*, 110 S. Ct. 290 (1989); *Iowa v. Newsom*, 414 N.W.2d 354 (Iowa 1987); *Koza v. Nevada*, 102 Nev. 181, 718 P.2d 671 (1986); and, on the other, *United States v. Hall*, 905 F.2d 959 (6th Cir. 1990); *United States v. Halliday*, 658 F.2d 1103 (6th Cir.), *cert. denied*, 454 U.S. 1127 (1981); *South Carolina v. Grizzle*, 293 S.C. 19, 358 S.E.2d 388 (1987), *cert. denied*, 484 U.S. 1012 (1988); *South Dakota v. Cody*, 323 N.W.2d 863 (S.D. 1982). Two of the decisions relied on by the United States support Minnick's reading of *Edwards*. In *United States v. Hall, supra*, the *Edwards* issue arose in the context of reinterrogation on a charge

(Footnote continued)

apparently found the rule simple to understand and easy to apply and alleged violations of *Edwards* have been rare.[13]

In the end, the proposed new rule is nothing but a thinly-veiled attempt to shift the burden of knowing and following the law from the police to the accused, thus leaving the police in a position to exploit the absence of counsel. *See Smith v. Illinois*, 469 U.S. at 98 (absent bright-line protection, police may exploit subtle distinctions in the law to persuade an accused to incriminate himself). The proper result is simple: because the *Edwards* rule is not broken, the invitation to fix it should be declined.[14]

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other than the one for which the accused invoked his Fifth Amendment right to counsel. As to the initial charge of escape, regarding which the accused had counsel, the court stated that "Hall's fifth amendment right against self-incrimination was protected." *Id.* at 963. In *United States v. Halliday*, *supra*, the FBI agents contacted the person they believed to be the accused's attorney for permission to reinterrogate the accused. The attorney, although not yet the attorney of record, indicated he had no objection but referred the agents to the attorney of record. Rather than do that, the agents obtained the accused's acknowledgment that the first attorney was his lawyer, that he did not want counsel appointed, and that he would waive his rights.

[13] The United States makes the unsupported assertion that if a cost-benefit analysis is applied, the proposed new rule should supplant *Edwards* in the interest of extracting more confessions. The reality is that statistical data on the effect of *Miranda* show no impairment to obtaining convictions. *See* Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 460 (1987) ("[t]he failure to turn up evidence of at least some negative impact [of *Miranda*] provides a striking demonstration of the paucity of such evidence and in effect strongly reinforces the prevailing wisdom that *Miranda* has not posed a significant barrier to effective police work").

[14] Contrary to the United States' belief (U.S. *Amicus* Br. at 14-16), lower courts have had little difficulty comprehending and applying *Edwards*. *E.g.*, *New Hampshire v. Dedrick*, 564 A.2d 423, 433 (N.H. 1989) (Thayer and Souter, JJ., dissenting), *cert. denied*, 110 S. Ct. 1305 (1990):

> "[T]he Supreme Court has consistently recognized the value of a prophylactic 'bright-line' prohibition of police-initiated questioning after the defendant has invoked his right to counsel. *See, e.g., Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405 (1983); *Edwards v. Arizona*, 451 U.S. 477, 486 n.9, 101 S. Ct. 1880, 1885 n.9, 68 L. Ed. 2d 378 (1981) (following a request for counsel, the accused and not the police must reopen dialogue with the
>
> *(Footnote continued)*

II. MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT

A. The Sixth Amendment Issue Is Properly Before This Court

Mississippi maintains that Minnick's petition for *certiorari* did not raise a claim under the Sixth Amendment, that Minnick's arguments rooted in the Sixth Amendment are presented for the first time in his brief on the merits and that they thus should not be considered (Miss. Br. at 40). To the contrary, Minnick's Sixth Amendment arguments that his conviction is invalid were made throughout this case: at trial (R. 347-48) and on direct appeal (Appellant's Brief to Mississippi Supreme Court, "Appellant's Br.," at 1, 12-14; Reply Brief of Appellant at 1-3; Appellant's Supplemental Brief at 2, 6-17).

The Question Presented in Minnick's petition for *certiorari* explicitly refers neither to the Fifth nor Sixth Amendment. Encompassing both amendments – in the context of a petition from a ruling which dealt with both amendments – it stated:

> "Whether, once an accused has expressed his desire to deal with law enforcement officers only through counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?"[15]

The Question Presented in Minnick's brief on the merits is not a verbatim quotation of that found in his petition for *certiorari*.

> authorities). Absent such a rule, the police 'through "badger[ing]" or "overreaching" – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.' *Smith v. Illinois*, *supra* (quoting *Oregon v. Bradshaw*, *supra*)."

See also Neuschafer v. McKay, 807 F.2d 839, 840 (9th Cir. 1987) (per Kennedy, J.) ("after he requested a lawyer and none was provided . . . [u]nder *Edwards*, Neuschafer's confession was illegally obtained unless, first, he initiated the interview that led to the confession and, second, knowingly and intelligently waived his right to counsel"; remanding case for determination on the initiation issue).

[15] Similarly, the United States puts the Question Presented as: "Whether law enforcement officers may reinitiate custodial interrogation after a suspect has invoked his right to counsel and consulted with a lawyer" (U.S. *Amicus* Br. at I).

But it neither "raise[s] additional questions" nor "change[s] the substance of the questions already presented," Sup. Ct. R. 24.1(a). Furthermore, "phrasing of the questions presented [in the petition and the brief on the merits] need not be identical." *Id.* Indeed, it is entirely proper to rephrase points in order to state them more clearly or accurately.

The rationale for limiting review to "[o]nly the questions set forth in the petition [for *certiorari*], or fairly included therein," Sup. Ct. R. 14.1(a), was made clear by this Court's admonishment that it "disapprove[s] the practice of smuggling additional questions into a case after [the Court] grant[s] *certiorari*." *Irvine v. California*, 347 U.S. 128, 129 (1954). No such "smuggling" has occurred here, nor was any intended. In fact, Mississippi's argument is more than a bit disingenuous. The State well understood the purport of the petition for *certiorari* upon its receipt. Its own restatement of the issues raised by the petition in its brief opposing the grant of a writ read as follows: "Petitioner's Fifth and Sixth Amendment rights were not violated by the admission of his confession into evidence" (Brief in Opposition to Petition for *Certiorari* at i). Its own brief in opposition to the petition for *certiorari* addressed the issue on the merits (*id.* at 6-15). Moreover, the Sixth Amendment issue had been – as Mississippi has acknowledged to this Court – passed upon by the Mississippi Supreme Court (Miss. Br. at 42, 48 n.15; JA 77). Minnick's petition for review encompassed a Sixth Amendment claim, which should be considered on the merits by this Court.

B. *Michigan v. Jackson* Mandates Reversal of Minnick's Conviction

In *Michigan v. Jackson*, 475 U.S. 625 (1986), this Court transposed the prophylactic rule of *Edwards* to reinitiation of interrogation once the Sixth Amendment attached and the accused asserted his right to counsel. *See also Michigan v. Harvey*, 110 S. Ct. 1176, 1180 (1990). For the same reasons Mississippi's position offends the Fifth Amendment under *Edwards*, it violates the Sixth Amendment because it would allow police to reinitiate interrogation without counsel present throughout critical pretrial stages, indeed, even up to the time

of trial itself.[10] Once the Sixth Amendment right to counsel attaches the government is precluded from making any attempt to elicit information from the accused without the presence of counsel or a valid waiver of the right to have counsel present. *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent"); *Brewer v. Williams*, 430 U.S. 387, 401 (1977) ("once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him"); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (Sixth Amendment violated by introduction of defendant's incriminating statements "which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel"). *See also Michigan v. Jackson*, 475 U.S. at 630.[11]

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[10] As noted by Justice Robertson dissenting below:

> "[I]magine this scenario. The day before trial the district attorney, or some representative of the prosecution force, . . . visits Minnick in his jail cell. This is done without so much as a 'By your leave' or 'Kiss my foot' to Minnick's lawyer. The district attorney says, 'Mr. Minnick, your trial begins tomorrow, and there are a few points I want to clear up before the trial begins.' Assume then that the district attorney . . . reads Minnick the standard *Miranda* warnings and without obtaining any express acknowledgment or waiver, written or oral, proceeds to ask Minnick questions, to which Minnick responds." (JA 114)

Nothing in the interpretation offered by Mississippi or in the rule proposed by the United States would preclude this scenario.

[11] The United States argues that the *Edwards* rule is only necessary to prevent coercion during custodial interrogation where the accused has requested, but not yet been afforded, the opportunity to consult with counsel (U.S. *Amicus* Br. at 10-12). The effort of the United States to restrict *Edwards* effectively asks the Court to undo *Jackson*. The bright-line rule enunciated by the Court in *Jackson* is not limited to situations involving incarceration, an unrepresented defendant, or even custodial interrogation. *Michigan v. Harvey*, 110 S. Ct. at 1177 (involving a defendant already represented by counsel). *See also Maine v. Moulton*, 474 U.S. at 176 (accused out on bail and already represented by and had consulted with counsel); *Massiah v. United States*, 377 U.S. at 202 (involving a defendant who was out on bail and had retained a lawyer).

The *Jackson* rule protects the accused's express desire to rely on counsel in dealing with the state and sets forth the state's "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking [the right to counsel]." *Maine v. Moulton*, 474 U.S. at 176. The holding in *Jackson* that once an accused expresses his desire to have the assistance of counsel, "the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting)" was reaffirmed in *Patterson v. Illinois*, 487 U.S. 285, 291 (1988). Mississippi's restrictive interpretation of *Edwards* — and therefore *Jackson* — would negate the states' obligation to honor the accused's request for counsel at the same time it destroys the bright-line rule of *Jackson*.

Mississippi's argument that the Sixth Amendment was not violated because Minnick "knowingly, intentionally and voluntarily" waived his right to counsel (Miss. Br. at 48 n.15) is not serious. The argument deals with *Jackson*, *Harvey* and like precedents by simply ignoring them. Deputy Denham's reinitiation of interrogation after Minnick requested counsel violated the rule of *Jackson*; thus Minnick could not, as a matter of Sixth Amendment law, be deemed to have waived his right to counsel. The Mississippi Supreme Court thus committed plain error in conducting a traditional waiver analysis in light of the *Jackson* violation. There should have been no further inquiry.

C. Minnick's Sixth Amendment Right To Counsel Attached Before Deputy Denham Reinitiated Interrogation

Mississippi now attempts to retract its concession below that Minnick's Sixth Amendment right to counsel attached prior to Deputy Denham's interrogation (JA 68), as well as to take issue with the ruling to that effect of the Mississippi Supreme Court (JA 76).[18] Mississippi and the United States would impose upon

[18] Mississippi would have this Court believe that it intended to admit only that Minnick's right to counsel had attached under the *Mississippi* Constitution (Miss. Br. at 46 n.14). What Mississippi stipulated to below, however, was that it was "evident that under Mississippi law, Minnick's Sixth Amendment right to counsel had attached at the time of the interview" (JA 68). The only "Sixth Amendment" either the State or its Supreme Court could have been referring

(Footnote continued)

the states a unified federal definition of the *procedural* point at which state adversarial proceedings commence, and an accused's Sixth Amendment right to counsel attaches (Miss. Br. at 45-48; U.S. *Amicus* Br. at 18-22). These arguments misconstrue this Court's precedents and ignore repeated pronouncements of the Mississippi Supreme Court.

It is settled — and we do not dispute — that the ultimate determination of when the Sixth Amendment right to counsel attaches is a matter of federal law. In defining the point of attachment, this Court held in *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality), that the "Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated." That determination, however, is in turn governed by the answer to the question of when, under applicable state or federal law, "adversary judicial proceedings" have in fact commenced.[19]

It is the law of Mississippi that determines the point at which the State initiated adversary proceedings against Minnick and, consequently, the point at which Minnick's Sixth Amendment

to was federal; Mississippi's right to counsel is embodied in Art. 3, Sec. 26 of its Constitution.

Below, Minnick raised issues under both the Sixth Amendment of the United States Constitution and the Mississippi Constitution. *See* Appellant's Br. at 1, 12-14 and Appellant's Supplemental Br. at 6-9. Indeed, Mississippi explicitly recognized this dual constitutional appeal. *See* Brief for Appellee to the Mississippi Supreme Court at 2.

[19] *Kirby* notes that formal adversary proceedings may take the form of "formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689. This recognizes that procedures for commencing adversary proceedings vary according to state laws. *United States ex rel. Dove v. Thieret*, 693 F. Supp. 716, 720 (C.D. Ill. 1988) ("[s]ince the mechanisms of criminal prosecution vary from state to state, the Supreme Court has not defined the exact point at which a prosecution is initiated"). *See also Jimpson v. Mississippi*, 532 So. 2d 985, 988 (Miss. 1988) (*Kirby* and *Brewer* "suggest that the Court look to the state procedure to determine when formal adversarial proceedings have been initiated"); *Nicholson v. Mississippi*, 523 So. 2d 68, 74 (Miss. 1988) (start of adversary proceedings "may be at formal charge, preliminary hearing, indictment, information, or arraignment, according to *Kirby*, implying that the states must determine, within the context of their criminal justice systems, how early that point will be").

right to counsel actually attached. *See Moore v. Illinois*, 434 U.S. 220, 228 (1977) (examining Illinois law to determine purpose of preliminary hearing and whether accused was entitled to counsel); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (examining Alabama law to determine whether preliminary hearing was critical stage and triggered Sixth Amendment right to counsel); *White v. Maryland*, 373 U.S. 59, 60 (1963) (*per curiam*) (examining Maryland law to determine when Sixth Amendment attached); *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961) (examining Alabama law to determine whether Sixth Amendment right to counsel attached at arraignment). *See also Corley v. Mississippi*, 536 So. 2d 1314, 1317 n.1 (Miss. 1988) ("[t]he correct reading of federal law is that the Sixth Amendment right to counsel attaches in a state criminal prosecution whenever *under state law* the criminal process is deemed begun").[20]

As noted in Minnick's opening brief, Mississippi law provides that "[a] prosecution may be commenced . . . by the issuance

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[20] Lower federal courts have deferred to state court and statutory determination of when a state's formal adversarial process against the accused commences and the Sixth Amendment right to counsel attaches. *E.g., Meadows v. Kuhlmann*, 812 F.2d 72, 76-77 (2d Cir.) (New York law setting filing of complaint and issuance of arrest warrant as beginning of criminal action governs Sixth Amendment analysis), *cert. denied*, 482 U.S. 915 (1987); *Felder v. McCotter*, 765 F.2d 1245, 1247-48 (5th Cir. 1985) (under Texas law "[t]he filing of an affidavit and criminal complaint in a Justice of the Peace court constitutes the institution of formal judicial criminal proceedings" for Sixth Amendment right to counsel purposes), *cert. denied*, 475 U.S. 1111 (1986); *United States ex rel. Sanders v. Rowe*, 460 F. Supp. 1128, 1139 (N.D. Ill. 1978) ("a federal court will defer to a state statute or opinion fixing the time that adversary judicial proceedings commence, if the time chosen is prior to that required by *Kirby*"); *United States ex rel. Burton v. Cuyler*, 439 F. Supp. 1173, 1179 (E.D. Pa. 1977) (determination of when adversary judicial proceedings begins depends "not only on the facts of the given case, but also upon the law of the jurisdiction in which the facts arose"), *aff'd without opinion*, 582 F.2d 1278 (3d Cir. 1978).

Many federal constitutional rights of state criminal defendants require application of state procedural law and are designed to operate in "the context of the criminal processes maintained by the American States." *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968). This Court has recognized that it "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). *Accord McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986).

of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." Miss. Code Ann. § 99-1-7 (1972). The Mississippi Supreme Court has repeatedly held that Mississippi adversary proceedings commence upon the issuance of an arrest warrant, as the State concedes here (Miss. Br. at 42-43).[21] In response to this, Mississippi and the United States argue that an arrest cannot mark the point of attachment in the federal system (Miss. Br. at 48; U.S. *Amicus* Br. at 19, 20 n.11).[22] But Mississippi and the United States fail to perceive that the authority on which they rely applies only to federal, and not state, convictions.[23] Indeed, the distinction between federal and state prosecutions was explicitly recognized in one case, *United States v. Pace*, 833 F.2d 1307, 1312 n.3 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011 (1988), cited by the United States (U.S. *Amicus* Br. at 20 n.11). The *Pace* court held:

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[21] Mississippi acknowledges to this Court that "The Mississippi Supreme [*sic*] held in *Livingston v. State*, 519 So. 2d 1218 (Miss. 1988), that the right to counsel in the Sixth Amendment sense attaches at the time an arrest warrant is issued" (Miss. Br. at 42-43). *See also Jimpson v. Mississippi*, 532 So. 2d at 988; *Nicholson v. Mississippi*, 523 So. 2d at 74.

[22] Arguing in the alternative, Mississippi and the United States also assert that an arrest pursuant to a warrant issued in Mississippi does not indicate a commitment by the State to prosecute (Miss. Br. at 47-48; U.S. *Amicus* Br. at 20-21). This argument is flatly contradicted by Mississippi statute, Miss. Code Ann. § 99-1-7 (1972), and repeated holdings of the Mississippi Supreme Court. *E.g., Page v. Mississippi*, 495 So. 2d 436, 440 (Miss. 1986).

[23] All but one of the cases cited by Mississippi and the United States involve convictions based on federal law, and thus have no bearing on whether state law determines the point at which an adversary criminal proceeding begins. *United States v. Gouveia*, 467 U.S. 180 (1984), cited by Mississippi and the United States, involved consolidated appeals of convictions based on federal law. *United States v. Pace*, 833 F.2d 1307 (9th Cir. 1987), cited by the United States, was also an appeal of a federal conviction as was *United States v. Guido*, 704 F.2d 675 (2d Cir. 1983). *Judd v. Vose*, 813 F.2d 494 (1st Cir. 1987) was an appeal from a judgment denying a habeas corpus petition, and involved a conviction under Massachusetts law. There, the court held consistent with Massachusetts law, which provides that adversary judicial proceedings commence with the filing of an indictment or complaint (Mass. Ann. Laws ch. 263, § 4 (Law. Co-op. 1980 & Supp. 1990)), that appellant's Sixth Amendment right to counsel did not attach upon arrest.

> "[b]ecause prosecution under *state* law is commenced at different times depending upon the criminal procedure statutes of the particular state, we limit our holding to federal criminal prosecutions." (citing *Moore v. Illinois*, 434 U.S. 220 (1977))

The United States additionally asserts that "[t]here is nothing unique about Mississippi's criminal procedure that would justify holding that the Sixth Amendment right to counsel attaches at the time an arrest warrant is issued" (U.S. *Amicus* Br. at 20). The Mississippi Supreme Court, however, has, in evaluating a Sixth Amendment claim, determined that the point at which adversary proceedings commence is designed to address unique characteristics of Mississippi procedure:

> "Application of [the federal] approach to our state constitutional right to counsel would be wholly unworkable. With grand juries meeting infrequently in many of our rural counties, such an approach would have the right to counsel available to the accused only after many months had passed following arrest. We also take note of the practice in many of our counties of postponing arraignment in order to avoid the impact of our 270 day rule. Miss. Code Ann. § 99-17-1 (Supp. 1985). Adherence to the recently stated federal approach to the right to counsel would, simply put, have the effect of providing that the accused had the right to counsel only after it could be said with reasonable certainty that it would no longer do him any good, *i.e.*, after the point where any competent law enforcement officer would long since have obtained a confession or other inculpatory statement." *Page v. Mississippi*, 495 So. 2d at 440 n.5.

Indeed, *amicus* the Mississippi State Bar notes "that under Mississippi's understanding of its criminal process, Minnick's Sixth

Amendment right to counsel had attached by the time of Denham's interrogation." *See* Brief *Amicus Curiae* of the Mississippi State Bar dated September 13, 1990 at 5.[24]

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[24] Mississippi's final, make-weight argument is that the decision below only addressed the right to counsel under the Mississippi Constitution (Miss. Br. at 42-47). It is clear, however, that the Mississippi Supreme Court's decision addressed the federal right to counsel, or, at the very least, encompassed both the state and federal rights. The decision below consistently refers to the right to counsel at issue as the "Sixth Amendment right to counsel" (JA 76-80). Mississippi's right to counsel, as we have previously observed, is not to be found in any provision labeled "Sixth Amendment," but in Article 3, Section 26 of its Constitution. Nowhere does the court cite to the Mississippi right to counsel provision. *See* JA 76-80. In any case, the Mississippi Supreme Court has made clear that its determination of when adversary proceedings commence applies to both the federal and state rights to counsel. *E.g.*, *Jimpson v. Mississippi*, 532 So. 2d at 988 (construing both federal and state right to counsel provisions); *Livingston v. Mississippi*, 519 So. 2d 1218, 1220 (Miss. 1988) (construing both federal and state right to counsel provisions).

CONCLUSION

The judgment affirming Minnick's conviction should be reversed.

Dated: New York, New York
September 27, 1990

Respectfully submitted,

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No. 89-6332 (8)

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT S. MINNICK, PETITIONER

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether law enforcement officers may reinitiate custodial interrogation after a suspect has invoked his right to counsel and consulted with a lawyer.

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In the Supreme Court of the United States

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ROBERT S. MINNICK, PETITIONER

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STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court held that a suspect who invokes his right to counsel during custodial interrogation "is not subject to further interrogation by the authorities until counsel has been made available to him," unless the suspect initiates further conversation. *Id.* at 484-485. This case presents the question whether the rule of *Edwards* should extend to cases in which a suspect has invoked his right to counsel, the interrogation has ceased, and the suspect has been afforded an opportunity to consult with counsel. The Court's resolution of this question will affect the conduct of in-

terrogations by federal law enforcement officers and the admission of voluntary statements by defendants in federal criminal prosecutions.[1] In addition, the Court's disposition of this case will affect the admissibility in federal prosecutions of statements obtained by state and local law enforcement officers in circumstances similar to those in this case.

STATEMENT

1. On April 25, 1986, petitioner and another man, James Dyess, escaped from the Clarke County, Mississippi jail. The day after their escape, petitioner and Dyess came upon a mobile home, which they entered in search of guns. Donald Thomas, the owner of the mobile home, drove up in a pickup truck while

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[1] The Federal Bureau of Investigation permits its agents to reinitiate interrogation after a suspect has invoked the right to counsel and has had an opportunity to consult with a lawyer. The FBI's *Legal Handbook for Special Agents* states:

> [I]f an accused invokes his/her right to counsel during the first effort at interview, Agents should not attempt a second interview until the accused has had an opportunity to consult with counsel or the accused "initiates" a second interview. This rule does not prevent Agents from recontacting an accused for the limited purpose of determining if he/she has had an opportunity to consult with counsel. If the accused states he/she has not had such opportunity, the recontact must be terminated. If, however, the accused states he/she has been afforded the opportunity but decided not to exercise this right, or he/she has in fact contacted counsel, Agents can engage in a second interview if, after again being advised of his/her *Miranda* rights, the accused agrees to waive these rights and speak with the Agents.

FBI, *Legal Handbook for Special Agents* § 7-4.1(5), at 84 (1990).

petitioner and Dyess were in the process of collecting guns and ammunition. Thomas was accompanied by Lamar Lafferty and Lafferty's two-year-old son. Dyess emerged from the trailer and shot Thomas in the back with a shotgun and in the head with a pistol. According to petitioner's confession, Dyess then ordered petitioner to shoot Lafferty with the pistol. Petitioner claimed that Dyess pointed the shotgun at him and forced him to shoot and kill Lafferty. J.A. 61-62, 70-73.

Thomas's younger sister Marty and her friend Desiree Beech drove up to the trailer shortly after the murders. Petitioner met the girls with a pistol and ordered them to get out of the car if they wanted to live. Marty Thomas recognized Lafferty's body lying on the ground outside the trailer. Petitioner and Dyess marched the girls into the trailer and tied their hands and feet with haystring. Dyess then dragged the bodies of the murder victims to a nearby gully, and the two men escaped in Thomas's pickup truck. J.A. 63, 70-71.

2. Warrants for petitioner's arrest on murder charges were issued by a Mississippi state court on May 6, 1986. J.A. 7, 26. On August 22, 1986, petitioner was arrested in San Diego County, California. The following day, agents of the Federal Bureau of Investigation interrogated petitioner at the San Diego County jail. The agents read petitioner the *Miranda* warnings, and petitioner indicated that he was willing to answer some questions, although he declined to sign a waiver form. J.A. 13-14, 74. During the interview, petitioner admitted that he had escaped with Dyess, that he and Dyess "got on the road" and "came to the trailer," and that Dyess believed they would find guns in the trailer that would be their "ticket out of town." J.A. 15. Petitioner

told the FBI agents that "[i]t was my life or theirs," and he said that Dyess had beaten him "a couple of days or a week after 'the mobile home.'" J.A. 14. The FBI agents commented that it appeared petitioner may have spared the lives of the two girls, to which petitioner responded that Dyess "wanted to kill them to[o]." J.A. 15. When petitioner hesitated to tell the agents exactly what had happened at the mobile home, they reminded him that he did not have to answer questions without a lawyer. Petitioner then told the agents to "[c]ome back Monday when I have a lawyer," and stated that he would make a more complete statement with his lawyer present. J.A. 16. The interrogation ceased immediately, and petitioner was provided with an attorney, with whom he consulted two or three times over the weekend. The attorney advised petitioner not to speak to anyone else about the incident at the mobile home. J.A. 14-16, 44-47, 73-75.

On Monday, August 25, after petitioner had consulted with his lawyer, Clarke County Deputy Sheriff J.C. Denham questioned petitioner at the San Diego County jail. Denham first advised petitioner of his *Miranda* rights, and petitioner again refused to sign a waiver form. The deputy asked petitioner whether he wanted to talk about what had happened. Petitioner replied, "It's been a long time since I've seen you." After conversing with Denham about relatives and friends in Mississippi, petitioner agreed to talk about his escape from the Clarke County jail. He proceeded to confess his involvement in the murders, although he said that he had killed only one of the two men, and then only because Dyess had forced him to do so. Petitioner refused to sign the deputy's handwritten notes of the interview. J.A. 73-75.

3. Petitioner waived extradition and was returned to Mississippi, where he was indicted in September 1986 on two counts of capital murder. In the trial court, he moved to suppress his confession, claiming that his statements were not voluntary and had been elicited in violation of his rights under the Fifth and Sixth Amendments. The trial court denied petitioner's motion, although it refused to allow the prosecution to introduce the deputy's notes of the interview. Petitioner was convicted of murdering Thomas and Lafferty and was sentenced to death. J.A. 19-20, 67, 69, 73-75.

4. The Mississippi Supreme Court affirmed petitioner's conviction and sentence. J.A. 69-117. The court upheld the admission of the statements petitioner made to Deputy Sheriff Denham. First, the court held that Denham's interrogation did not violate the principles of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Under *Edwards*, a suspect who requests an attorney is not subject to further police-initiated interrogation "until counsel has been made available to him." J.A. 75 (quoting *Edwards*, 451 U.S. at 405). After the suspect has had an opportunity to consult with counsel, the court held, "the *Edwards* bright-line rule as to initiation does not apply," and interrogation may resume. J.A. 75-76.

The Mississippi Supreme Court also rejected petitioner's argument that Denham's interrogation violated petitioner's right to counsel under Mississippi law.[2] J.A. 76. The court concluded that petitioner "had been advised by an attorney prior to the con-

[2] As discussed below, see pp. 21-22, *infra*, the Mississippi Supreme Court has held, as a matter of state law, that the right to counsel under the Mississippi Constitution attaches when a suspect is arrested pursuant to a warrant.

versation with Denham, was aware that he did not have to make any statements or answer any questions, and * * * made a conscious decision to relinquish his Sixth Amendment right to counsel." J.A. 80.

Justice Robertson dissented. J.A. 112-117. He observed that Rule 4.2 of the Mississippi Rules of Professional Conduct prohibits lawyers from communicating directly with parties known to be represented by counsel, and found "no basis for assuming that a prosecuting attorney is exempt from [this rule]." J.A. 113. Accordingly, Justice Robertson concluded that, once a suspect's right to counsel under Mississippi law has attached, he may not be questioned except through counsel. J.A. 117.

SUMMARY OF ARGUMENT

1. The rule of *Edwards* should not be extended to prohibit law enforcement officers from reinitiating questioning when, after a suspect has invoked his right to counsel, he has been afforded an opportunity to consult with counsel and has done so. The prophylactic rules of *Edwards* and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are designed to counteract the psychological pressures of custodial interrogation. The Court, however, has declined to "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975). Applying the rule of *Edwards* in the circumstances of this case is unjustified because the potentially coercive pressures of custodial interrogation are dissipated when the interrogation is broken off and the suspect is given an opportunity to confer with counsel.

Petitioner's invocation of the right to counsel demonstrated that he was capable of choosing between

speech and silence even before he conferred with a lawyer. And the fact that petitioner's request for counsel was honored gave him no reason to doubt that a second invocation of his rights would be honored. The risk of police badgering or overreaching that concerned the court in *Edwards* is therefore not sufficiently serious in this setting to justify imposing on society the high cost of excluding probative, voluntary confessions.

2. Petitioner did not present a Sixth Amendment question in his petition for certiorari. The Court should therefore decline to consider his Sixth Amendment argument. In any event, petitioner's Sixth Amendment rights had not attached at the time of his confession, since he had not been formally charged or even arraigned on the arrest warrant. Petitioner's contention that his Sixth Amendment right to counsel attached when the arrest warrant was issued is not supported by prior decisions of this Court or the Mississippi Supreme Court. Federal law, not state law, determines the moment at which federal constitutional rights attach. Mississippi has determined only that the right to counsel under a parallel provision of the Mississippi Constitution attaches when an arrest warrant is issued, a point that is irrelevant to analysis of the federal Sixth Amendment question.

ARGUMENT

I. THE *EDWARDS* RULE SHOULD NOT BE EXTENDED TO INTERROGATIONS CONDUCTED AFTER A SUSPECT HAS CONSULTED WITH A LAWYER

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. To counteract those pressures, the Court devised prophylactic rules intended to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469.

Fifteen years later, in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court adopted an additional prophylactic rule for cases in which the accused invokes the right to counsel after *Miranda* warnings have been given. The Court held that, following such a request, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

The question in this case is whether the rule of *Edwards* should be extended to prohibit law enforcement officials from questioning a suspect whose prior invocation of the right to counsel has been honored by breaking off the interrogation and affording the suspect an opportunity to consult with a lawyer. Neither *Edwards* nor subsequent decisions of this Court applying the *Edwards* rule have resolved that question, because the suspects in those cases were not permitted to consult with counsel before the police

reinitiated questioning.[5] We submit that *Edwards* should not apply in this setting. Because the risk that a suspect will capitulate to police coercion is greatly reduced when questioning is broken off and the suspect is afforded an opportunity to consult with an attorney, any benefit that might be obtained by applying the prophylactic rule of *Edwards* in this context does not outweigh the costs associated with the suppression of voluntary and highly probative confessions.

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[5] See *Arizona* v. *Roberson*, 486 U.S. 675, 678 (1988); *Connecticut* v. *Barrett*, 479 U.S. 523, 525-527 (1987); *Shea* v. *Louisiana*, 420 U.S. 51, 52 (1985); *Smith* v. *Illinois*, 469 U.S. 91, 92-94 (1984); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1041-1042 (1983); *Wyrick* v. *Fields*, 459 U.S. 42, 43-45 (1982). In *Solem* v. *Stumes*, 465 U.S. 638, 642 (1984), the suspect spoke to an attorney over the telephone after he was taken into custody, and he subsequently invoked his right to counsel. Despite the suspect's invocation of his rights, the police twice reinitiated interrogation without permitting further consultation with the lawyer. *Id.* at 639-641. The Court assumed, for purposes of deciding whether *Edwards* would be applied retroactively, that the renewed interrogation violated *Edwards*. 465 U.S. at 642.

Petitioner argues that the decision of the Mississippi Supreme Court is inconsistent with language in this Court's opinions. Pet. Br. 12-13, 15-18. But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *CBS, Inc.* v. *FCC*, 453 U.S. 367, 385 (1981) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979)). It is true that some of this Court's formulations of the *Edwards* rule would seem to be broad enough to prohibit the renewed questioning in this case, but other formulations—such as the statement in *Edwards* itself that counsel must be "made available" to the accused—would seem to permit the questioning here. Consequently, the question whether the rule of *Edwards* should be extended to a new class of cases should be decided on its merits rather than on the basis of language in prior opinions presenting different facts.

1. The *Edwards* rule, like other aspects of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). Because compulsion is an essential element of a Fifth Amendment violation, see *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966); *Illinois* v. *Perkins*, 110 S. Ct. 2394, 2397-2398 (1990), the prophylactic rule of *Edwards* must be based on the risk of coercion. The Court has said that the justification for the *Edwards* rule is the risk that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984); see also *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion).

Where the suspect invokes his right to counsel and the authorities immediately break off the interrogation and afford the suspect an opportunity to consult with counsel, the risk of coercion is greatly reduced. In that setting, in contrast to the *Edwards* setting in which the suspect is never given a lawyer, it is far less likely that law enforcement officers will wear down the accused and induce him to confess. There is therefore no need to extend the *Edwards* per se rule of exclusion to the setting of this case by presuming conclusively that reinitiation of questioning, even after the suspect has consulted a lawyer, will overcome the will of the suspect and compel him to speak when he would otherwise remain silent.

After consulting with a lawyer, the accused is in a far better position to exert control over the course of the questioning. He has had the benefit of his lawyer's advice, and he understands that he is not required to face interrogation alone. Because the suspect's initial request for counsel was honored, he has no reason to doubt that police will honor a request to discontinue the renewed questioning. Cf. *Arizona* v. *Roberson*, 486 U.S. at 686 n.6 (doubt may be raised by failure to provide suspect with requested counsel). Moreover, the break in questioning itself dissipates the psychological pressures of interrogation. It does not violate the suspect's "right to cut off questioning," *Miranda*, 384 U.S. at 474, for the police to inquire, after the suspect has consulted with counsel, whether he is now prepared to speak with them.[4]

In sum, the opportunity to consult with counsel relieves the "pressures of custodial interrogation" that gave rise to the per se rule of *Edwards*. The Court therefore should not extend the *Edwards* rule to a suspect who has invoked his right to counsel and has had an opportunity to consult with a lawyer.[5]

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[4] In this case, petitioner actually consulted with a lawyer on several occasions before Deputy Sheriff Denham questioned him on August 25, 1986. The analysis would not be significantly different if he had been offered counsel but had declined the opportunity to consult with counsel before his reinterrogation.

[5] The rule applied by the Mississippi Supreme Court in this case, like the rule of *Edwards* itself, is a bright-line rule that fully "serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Roberson*, 486 U.S. at 682. There is nothing vague or ambiguous about the requirement that law enforcement officers not reinitiate interrogation of a suspect in custody who invokes the right to

The right to counsel during questioning and the right to terminate questioning were the two principal safeguards created by the Court in *Miranda* to protect the constitutional privilege against compelled self-incrimination during custodial interrogation. Accordingly, once the State has provided the suspect access to counsel, the suspect is in the same legal position as any other suspect who has previously chosen to invoke his right to silence and cut off questioning. As long as the police do not persist in "repeated efforts to wear down [the suspect's] resistance and make him change his mind," *Michigan* v. *Mosley*, 423 U.S. 96, 105-106 (1975), they should be allowed to approach the suspect to determine whether, after speaking with counsel, he wishes to submit to police questioning.

2. Because *Miranda* and *Edwards* establish prophylactic rules, and thus may result in the exclusion of some voluntary confessions, the Court has been careful to weigh the benefits of those rules against their costs each time it has determined whether to apply them to a new class of cases. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298, 306-307, 309 (1985) (*Miranda* "sweeps more broadly than the Fifth Amendment itself"); *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974); see also *New York* v. *Quarles*, 467 U.S. 649, 657 (1984); *Duckworth* v. *Eagan*, 109 S. Ct. 2875, 2883 (1989) (O'Connor, J., concurring).

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counsel "until counsel has been made available to him." *Edwards*, 451 U.S. at 484-485. Thus, there is no reason to prefer the rule of *Edwards* to the rule applied by the Mississippi Supreme Court on the basis of clarity or ease of application.

In the *Edwards* setting, the Court found the per se rule justified because the Court considered it highly unlikely that a person who had invoked his right to counsel would validly waive that right when the police again approached him without respecting his request for counsel. The few cases in which a valid waiver might be found in that setting were not worth the litigation costs and the chance of an erroneous finding of waiver. Moreover, the per se *Edwards* rule had the benefit of discouraging a police practice that the Court regarded as having a high risk of abuse and little justification.

The benefits of extending the *Edwards* rule to cases such as this one are much more modest. A per se rule would, of course, still enable the courts to avoid having to make case-by-case inquiries into the validity of a suspect's waiver of his rights and would avoid certain litigation errors. But because a suspect is less likely to be subject to coercion after he has consulted with an attorney, there will be many more valid waivers in a case like this one than in the *Edwards* setting. Moreover, the benefit of avoiding litigation errors against the defendant will be counterbalanced by the errors that the per se rule automatically generates by disabling the State from proving that particular waivers were valid. Finally, because the police practice of reinitiating contact with the suspect after he has consulted with counsel carries less risk of abuse than the practice at issue in *Edwards*, there is no justification for creating a rule to discourage the practice altogether.

By contrast, the costs of extending the *Edwards* rule to questioning initiated after a suspect has consulted with counsel would be significant. This Court has recognized that " 'the need for police questioning

as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable' * * *; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986); see also *Oregon* v. *Elstad*, 470 U.S. at 305; *United States* v. *Washington*, 431 U.S. 181, 186, 187 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Confessions, if obtained by fair methods that guarantee their reliability, result in the resolution of many cases that could not otherwise be solved, ensure confidence in the accuracy of criminal judgments, reduce the risk of prosecuting or convicting innocent persons, and alleviate burdens on all segments of the criminal justice system. Any rule that excludes voluntary, reliable confessions from evidence therefore imposes substantial costs and carries a heavy burden of justification.

Petitioner asserts (Pet. Br. 15 n.12) that "[o]ther courts have generally agreed that *Miranda* and *Edwards* forbid any state-initiated interrogation without counsel present once the accused has requested that counsel act as a medium between him and the government." That assertion contrasts sharply with the argument in the petition for certiorari that "[m]any lower courts have differed on the proper interpretation of *Edwards*," Pet. 5, and petitioner's assertion that "the lower courts are in hopeless disarray over this issue." Pet. Reply Br. 5. In fact, the great majority of the cases petitioner cites in his brief on the merits do not stand for petitioner's proposition. Indeed, in many of the cases cited by petitioner, the court held that there was no violation of the Fifth Amendment, because the suspect

did not request counsel,[6] or the police did not initiate the discussion,[7] or the custody was not continuous.[8] Moreover, in most of the cited cases in which the court found a Fifth Amendment violation, the authorities did not break off the interrogation and give the suspect an opportunity to consult with counsel.

Only three of the cases on which petitioner relies applied the *Edwards* rule to the interrogation of a defendant who had invoked the right to counsel and consulted with a lawyer before the resumption of police questioning. See *Roper* v. *State*, 258 Ga. 847, 375 S.E.2d 600, cert. denied, 110 S. Ct. 290 (1989); *State* v. *Newsom*, 414 N.W.2d 354 (Iowa 1987); *Koza* v. *State*, 102 Nev. 181, 718 P.2d 671 (1986).[9]

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[6] See *Terry* v. *LeFevre*, 862 F.2d 409 (2d Cir. 1988); *United States* v. *Weisz*, 718 F.2d 413 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984); *People* v. *Gacho*, 122 Ill. 2d 221, 522 N.E.2d 1146, cert. denied, 109 S. Ct. 264 (1988); *State* v. *Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990); *State* v. *Broom*, 40 Ohio St. 3d 277, 533 N.E.2d 682 (1988), cert. denied, 109 S. Ct. 2089 (1989).

[7] See *Pittman* v. *Black*, 764 F.2d 545 (8th Cir.), cert. denied, 474 U.S. 982 (1985); *Doerner* v. *State*, 500 N.E.2d 1178 (Ind. 1986); *State* v. *Conover*, 312 Md. 33, 537 A.2d 1167 (1988); *State* v. *Morris*, 719 S.W.2d 761 (Mo. 1986) (en banc); *State* v. *Turner*, 136 Wis. 2d 333, 401 N.W.2d 827 (1987).

[8] See *People* v. *Trujillo*, 773 P.2d 1086 (Colo. 1989) (en banc).

[9] In *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117 (7th Cir.), cert. denied, 483 U.S. 1010 (1987), the court held that the suspect had "invoked" his right to counsel, but the suspect in that case did not in fact request counsel, and the court's holding was based only on the suspect's "unqualified acceptance of counsel at his arraignment." 813 F.2d at 123 & n.4.

Other courts presented with that factual situation have reached the same result as the Mississippi Supreme Court in this case. See *United States* v. *Hall*, 905 F.2d 959 (6th Cir. 1990); *United States* v. *Halliday*, 658 F.2d 1103 (6th Cir.), cert. denied, 454 U.S. 1127 (1981); *State* v. *Grizzle*, 293 S.C. 19, 358 S.E.2d 388 (1987), cert. denied, 484 U.S. 1012 (1988); *State* v. *Cody*, 323 N.W.2d 863 (S.D. 1982). Thus, petitioner's suggestion that a consensus has developed in the lower courts is incorrect. Because the balance of costs and benefits argues against a per se rule in this setting, the Court should hold that where a suspect has requested and been given an opportunity to consult with counsel, the admissibility of any statement he subsequently makes to law enforcement officers should be judged by the standards that apply generally to statements made by suspects in the course of custodial interrogation.[10]

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[10] The dissenting justice of the Mississippi Supreme Court concluded that a state ethical rule prohibiting attorneys from contacting represented parties should be applied to preclude questioning of suspects represented by counsel. J.A. 112-117 (Robertson, J., dissenting). Of course, this Court does not determine whether state criminal trials were conducted in accordance with state rules of professional ethics. Such ethical rules are of constitutional significance, if ever, only after the Sixth Amendment right to counsel has attached upon the commencement of formal judicial proceedings against the suspect. See *Patterson* v. *Illinois*, 487 U.S. 285, 302-303 (1988) (Stevens, J., dissenting) (ethical violation "rise[s] to the level of an impairment of the Sixth Amendment right to counsel" when "adversary proceedings commence"). As demonstrated below, petitioner's Sixth Amendment rights had not attached at the time of his confession. Thus, the ethical rule cited by Justice Robertson is irrelevant here.

II. THE INTERROGATION DID NOT VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHTS

Petitioner also argues (Br. 22-31) that the admission of his confession violated the Sixth Amendment.

1. As an initial matter, the petition for certiorari did not present a Sixth Amendment issue, but instead asked the Court to resolve a conflict in the lower courts under the Fifth Amendment. Petitioner framed the question presented as "[w]hether, once an accused has invoked his Fifth Amendment right to counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?" Pet. Reply Br. I. Petitioner asked the Court to grant certiorari to resolve a conflict between the decision in this case and *Roper* v. *State*, 258 Ga. 847, 375 S.E.2d 600, cert. denied, 110 S. Ct. 290 (1989), and stated that "the Georgia Supreme Court reversed the conviction in *Roper* because a confession had been exacted in violation of the Fifth Amendment." Pet. 6. Petitioner also alleged a conflict with the Seventh Circuit's decision in *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, cert. denied, 483 U.S. 1010 (1987), and noted that the Seventh Circuit "expressly rejected Espinoza's Sixth Amendment claim * * * and rested the decision solely on the Fifth Amendment." Pet. 7 n.5. See also Pet. 9 ("Relying on the Fifth Amendment, the court [in *State* v. *Preston*, 555 A.2d 360 (Vt. 1988)] ordered the suppression of [the statement]"); Pet. 9 n.11 (*State* v. *Perkins*, 753 S.W.2d 567 (Mo. App. 1988), "rest[s] * * * solely on the Fifth Amendment"). Indeed, immediately after recapitulating "[t]he question before this Court," the petition stated that "[i]n the context of

the Sixth Amendment right to counsel, this question would obviously not arise." Pet. 11.

In short, the petition sought review of a Fifth Amendment question, not the Sixth Amendment question petitioner now seeks to place before the Court in his brief on the merits. Accordingly, the Court should follow its usual practice and decide only the Fifth Amendment question presented in the petition. See Sup. Ct. R. 24.1(a) ("[T]he brief may not raise additional questions or change the substance of the questions already presented in [the petition for a writ of certiorari]."); see also *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 428-429 (1964).

2. If the Court decides that the Sixth Amendment issue is properly presented for review, it should find that there was no Sixth Amendment violation in this case, because petitioner's Sixth Amendment rights had not attached at the time of his interrogation.

The right to counsel afforded by the Sixth Amendment attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion); see also *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). The initiation of formal judicial proceedings "is the starting point of our whole system of adversary criminal justice," and the point at which the accused is "immersed in the intricacies of substantive and procedural criminal law." *Kirby*, 406 U.S. at 689. The Court's approach is consistent with the "core purpose" of the Sixth Amendment right to counsel, which is to ensure the assistance of counsel at trial and at critical pretrial proceedings in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984).

Petitioner asserts that "this Court looks to the criminal law of the state in question" to "determine when formal criminal proceedings begin." Pet. Br. 23-24 (citing *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977)). If petitioner is contending that state law determines when Sixth Amendment rights attach, he is plainly wrong. The determination whether "the guiding hand of counsel * * * is essential" at a particular point in the prosecution is a matter of federal law. See *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970). Nothing in *Moore* v. *Illinois*, *supra*, suggests that state law determines the point at which, under federal law, the Sixth Amendment right to counsel attaches. Rather, the Court in *Moore* applied the standards enunciated in *Kirby* to make that determination. In *Moore*, the Court concluded that "the government ha[d] committed itself to prosecute," and the defendant was "faced with the prosecutorial forces of organized society," at the preliminary hearing stage. 434 U.S. at 228.

Petitioner is equally off the mark if he is contending that, as a matter of federal law, his Sixth Amendment rights attached at the moment the arrest warrants were issued by a Mississippi court. This Court has "never held that the [Sixth Amendment] right to counsel attaches at the time of arrest." *United States* v. *Gouveia*, 467 U.S. at 190. On the contrary, the Court has held that, where formal charges have not been filed prior to arrest, "the arraignment signals 'the initiation of adversary judicial proceedings.'" *Michigan* v. *Jackson*, 475

U.S. 625, 629 (1986) (citing *Gouveia*, 467 U.S. at 187-188).[11]

There is nothing unique about Mississippi's criminal procedure that would justify holding that the Sixth Amendment right to counsel attaches at the time an arrest warrant is issued or at the time the subject of the warrant is arrested. Because the issuance of an arrest warrant in Mississippi, as elsewhere, is an ex parte proceeding, Miss. Code Ann. § 99-3-21 (1972), there is no role for defense counsel at that stage of the proceedings. Moreover, in Mississippi, as in other jurisdictions, an application for a warrant and an arrest on the warrant do not

[11] Nomenclature in this area can be confusing. In many States, the term "arraignment" refers to an arrestee's first appearance before a judical officer shortly after arrest, at which the judicial officer typically sets the terms of the arrestee's release, advises him of his rights, and may arrange for the appointment of counsel if the arrestee is indigent. In the federal system, and in Mississippi, that proceeding is referred to as the "initial appearance." See Fed. R. Crim. P. 5; Rule 1.04, Miss. Uniform Crim. R. of Cir. Ct. Practice (1979). The "arraignment," in both the federal system and in Mississippi, occurs later, after formal charges are filed; it is the proceeding at which the defendant enters his plea to the charges. See Fed. R. Crim. P. 10; Rule 3.01, Miss. Uniform Crim. R. of Cir. Ct. Practice. A preliminary hearing, in both state and federal systems, is an adversary hearing at which the State seeks to establish to the satisfaction of a judicial officer that it has probable cause to hold the defendant to answer to the charges. See Fed. R. Crim. P. 5.1; Rule 1.07, Miss. Uniform Crim. R. of Cir. Ct. Practice (1979). In the federal system, which generally parallels Mississippi practice, it is settled that the Sixth Amendment right to counsel does not attach at arrest. See *United States* v. *Gouveia, supra; United States* v. *Pace*, 833 F.2d 1307, 1310-1312 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988); *Judd* v. *Vose*, 813 F.2d 494, 496-497 (1st Cir. 1987); *United States* v. *Guido*, 704 F.2d 675, 676 (2d Cir. 1983).

reflect a firm commitment on the part of the State to institute criminal proceedings against the suspect. It is only at the point at which the State files formal charges, or where "the intricacies of substantive and procedural criminal law" come into play, *Kirby*, 406 U.S. at 689, that the Sixth Amendment right to counsel attaches. Accordingly, petitioner's Sixth Amendment right to counsel had not attached at the time of his interview by Deputy Sheriff Denham.[12]

Contrary to petitioner's contention (Pet. Br. 22-24), the Mississippi Supreme Court has not held that federal Sixth Amendment rights attach when an arrest warrant is issued, but instead has expressly based its decisions on a parallel provision of the Mississippi Constitution. In *Page* v. *State*, 495 So. 2d 436, 440 n.5 (1986), the Supreme Court of Mississippi stated that it was "very much aware of the fact that a number of recent cases have held that the right to counsel secured by the Sixth Amendment to the Constitution of the United States is available only after the initiation of judicial criminal proceedings, *i.e.*, indictment and arraignment." In holding that the right to counsel attaches upon arrest, the court expressly "reject[ed] the federal approach" and "rel[ied] exclusively upon state law." *Ibid.* See also *id.* at 439 ("For purposes of our state constitutional right to counsel, we define the advent of the accusatory stage by reference to state law."); *Can-*

[12] Petitioner's argument (Pet. Br. 22-23 n.16) appears to assume that if the Sixth Amendment right to counsel attaches at some time before indictment, it must attach when the arrest warrant is issued. This is an oversimplification, because there are several intermediate stages in the Mississippi process, including the initial appearance and the preliminary hearing. See Rules 1.04 and 1.07, Miss. Uniform Crim. R. of Cir. Ct. Practice (1979).

naday v. *State*, 455 So. 2d 713, 722 (Miss. 1984) ("[W]e base our opinion herein on Mississippi law. * * * Mississippi jurisprudence compels the result.").[13]

The correctness of the Mississippi court's resolution of Mississippi law regarding the right to counsel under that State's Constitution is, of course, not at issue here. Under federal law, petitioner's right to counsel had not attached at the time he made the statements at issue in this case. The Sixth Amendment to the United States Constitution therefore has no role to play in determining the admissibility of those statements at petitioner's trial.

CONCLUSION

The judgment of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted.

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[13] The only other Mississippi precedent cited by petitioner, *Livingston* v. *State*, 519 So. 2d 1218, 1221 (Miss. 1988), expressly relied upon the reasoning of *Cannady* and *Page*. See 519 So. 2d at 1220.

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No. 89-6332

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Supreme Court of the United States
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Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Writ of Certiorari to the Mississippi Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE MISSISSIPPI STATE BAR IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the Mississippi Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Mississippi State Bar respectfully petitions this Court for leave to file the attached brief *amicus curiae* in support of petitioner.

The Mississippi State Bar is a unified bar, encompassing every person licensed to practice law in Mississippi. The Bar was founded in 1909 as a voluntary bar, and became a unified bar in 1932 as a result of action by the state legislature. The Bar has more than 5,700 active members, approximately 4,800 of whom reside in Mississippi.

The Bar functions as the disciplinary arm of the Mississippi Supreme Court, and is thus directly responsible for ensuring that lawyers in Mississippi adhere to the ethical canons and rules governing the legal profession.[1]

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[1] The Model Rules of Professional Conduct have been in force in Mississippi since July 1, 1987. From 1971 until June 30, 1987—

This duty encompasses a broader responsibility on the part of the Bar to maintain the integrity of—and public confidence in—the legal profession in the State of Mississippi.

The Bar's interest in the present case stems from these responsibilities. Although resolution of this case depends on principles of constitutional law and not the canons of professional ethics, the Bar believes that consideration of the ethical rules applicable to the present facts can contribute to a proper resolution of the decisive constitutional questions. The Bar also seeks the opportunity to urge that the constitutional questions in this case be resolved in a way that does not undermine relevant ethical prohibitions, and that does not diminish the integrity of the profession and the adversary process.

For the foregoing reasons, the Mississippi State Bar urges this Court to grant its motion and accept for filing the attached brief *amicus curiae*.

Respectfully submitted,

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the period encompassing the events at issue in this case—the Code of Professional Responsibility was in force.

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BRIEF AMICUS CURIAE OF THE MISSISSIPPI STATE BAR IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The interest of *amicus* is set forth in the accompanying motion for leave to file a brief *amicus curiae*.

STATEMENT

This case raises important Fifth and Sixth Amendment issues about the extent to which prosecutors and police officers are obliged to respect a criminal suspect's decision to communicate with them only through counsel. Ethical principles that govern the conduct of all attorneys —including prosecutors—do not control these constitutional issues, but can shed considerable light on their proper resolution. In particular, the longstanding ethical rule prohibiting direct communication between an attorney and an adverse party highlights the grave risk of overreaching that inheres in a direct confrontation

between prosecutorial authority and an individual suspect unassisted by counsel. In the judgment of *amicus*, therefore, relevant ethical principles strongly suggest that the constitutional analysis of the Mississippi Supreme Court in this case was wrong and should be reversed.

The material facts, as set forth in the opinion of the Mississippi Supreme Court, are largely undisputed.[2] Petitioner Minnick was arrested and taken into custody in late August 1986 by officials in San Diego, California, on the authority of arrest warrants charging Minnick with having committed murder in Mississippi. On August 23, 1986, agents of the Federal Bureau of Investigation interrogated Minnick while he was held in custody in San Diego. Minnick was advised of his Fifth Amendment rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), and explicitly declined to waive those rights. Minnick responded to some initial questions from the agents, but then demanded the assistance of counsel: he informed the agents to "come back Monday when I have a lawyer." Following established FBI procedure and this Court's dictate in *Edwards v. Arizona*, 451 U.S. 477 (1981), the agents immediately ceased their questioning. Sometime after the end of this interrogation but before August 25th, counsel was appointed for Minnick and spoke with Minnick a few times.

On August 22, 1986, Deputy J.C. Denham—the Chief Investigator of the Clarke County, Mississippi Sheriff's Department—received word from San Diego authorities that Minnick had been taken into custody. Denham flew to San Diego on August 24th, and interrogated Minnick on August 25th. When Denham arrived at the jail where Minnick was still in custody, the San Diego authorities "told Minnick that he would *have to* go down

[2] The facts set forth in this brief are drawn from the opinion of the Mississippi Supreme Court. *Minnick v. State*, 551 So.2d 77 (1988).

and talk to Denham." 551 So.2d at 82 (emphasis added). No effort was made to let Minnick's appointed lawyer know that interrogation was to recommence.

Denham asked Minnick to sign a written statement waiving his rights, but Minnick refused. Denham then asked Minnick whether he wanted to talk about the murders in Mississippi, and Minnick again refused. However, because Denham and Minnick had a long acquaintance, Denham was able to sustain a general conversation with Minnick. When Denham inquired about a prison escape, Minnick replied by stating "it's been a long time since I've seen you." According to Denham's notes, Minnick then described his escape, and eventually confessed to the murders allegedly committed in the course of that escape. After doing so, Minnick again invoked his Fifth Amendment rights and refused to speak further. Denham left the room and transcribed his version of the interrogation. Minnick refused to sign Denham's handwritten description of the alleged confession.

Minnick subsequently was tried in Mississippi for capital murder, convicted and sentenced to die. Denham's version of Minnick's statement was the centerpiece of the State's case at trial. Counsel for Minnick sought to have the testimony excluded on the ground that it was obtained in violation of Minnick's rights under the Fifth and Sixth Amendments to the Constitution of the United States. Finding that the statement was freely given and that Minnick had knowingly and intelligently waived his constitutional rights, the trial court denied the motion.

The Mississippi Supreme Court affirmed. The court held that Minnick's Fifth and Sixth Amendment rights were not violated by Denham's interrogation, despite this Court's repeated injunction that "interrogation must cease" when a defendant in custody requests the assistance of counsel. *See Michigan v. Jackson*, 475 U.S. 625

(1986); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

The court analyzed the Fifth and Sixth Amendment issues separately. With respect to the Fifth Amendment, the court acknowledged that *Edwards v. Arizona* set forth a bright-line rule precluding interrogation of a suspect who requests counsel unless counsel is present or the suspect initiates further discussion. But the court found the rule inapplicable here because Minnick had consulted with counsel before the renewed interrogation. This consultation, in the court's view, "satisfied" the Fifth Amendment. 551 So.2d at 83.

With respect to the Sixth Amendment, the court ruled that even though Minnick's right to counsel had attached by the time of Denham's interrogation, Minnick's informed decision to discuss matters with Denham constituted a knowing and intelligent waiver. 551 So.2d at 84. The court did not mention this Court's ruling in *Michigan v. Jackson*, which extended the rule of *Edwards* to interrogations that occur after a suspect's Sixth Amendment right to counsel has attached.

At bottom, the Mississippi Supreme Court held that neither the Fifth nor the Sixth Amendment preclude police-initiated interrogation of a defendant in custody who has had invoked the right to counsel, so long as the defendant has had some opportunity to consult with counsel prior to resumption of interrogation. Defense counsel need not be present during the renewed interrogation, or even be informed that such interrogation is to occur.

Justice Robertson dissented. In his view, the renewed interrogation by Deputy Denham violated familiar Fifth and Sixth Amendment principles precluding interrogation of a suspect who has requested counsel. Justice Robertson argued that the police-initiated interrogation in this case should have been held unconstitutional for reasons akin to those underlying the rule of legal ethics

prohibiting an attorney from communicating directly with an adverse party represented by counsel:

> We have a rule that seems to work well in civil cases. A lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present. . . . We regard this rule as a fair one. Its genesis lies in our concern with fairness. That the third party has a lawyer is taken as an expression of his wish to be dealt with only through counsel. There is substantial probability of the party being overreached when his lawyer is not there. The integrity of the lawyer-client relationship is at stake.

551 So.2d at 101-102 (Robertson, J., dissenting).

This Court granted certiorari on April 23, 1990.

ARGUMENT

This case implicates both the Fifth and Sixth Amendment rights of petitioner Minnick. There is no dispute that Minnick was in custody at the time of the interrogation, and therefore entitled to the Fifth Amendment protections set forth in *Miranda v. Arizona*, including the assistance of counsel to protect his right against self-incrimination. Nor is there any dispute—as the Mississippi Supreme Court found and respondent conceded,[3] 551 So.2d at 83—that under Mississippi's understanding of its criminal process, Minnick's Sixth Amendment right to counsel had attached by the time of Denham's interrogation.[4]

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[3] *See* Brief of Appellee in *Minnick v. State*, at 3 ("It is also evident that under Mississippi law, Minnick's Sixth Amendment right to counsel had attached at the time of the interview since warrants for his arrest had been issued").

[4] Although this finding of the Mississippi Supreme Court (and this concession by respondent) would appear to foreclose further debate on the issue, the attachment of the Sixth Amendment right to counsel is not critical to the separate and analogous Fifth Amend-

To ensure that a suspect's assertion of Fifth Amendment rights is respected by the police and not undermined through repeated attempts at custodial interrogation, the Court held in *Edwards v. Arizona* that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights." 451 U.S. at 484. In *Michigan v. Jackson*, the Court extended the *Edwards* rule to the Sixth Amendment context: "if police initiate interrogation after a defendant's assertion . . . of his [*Sixth Amendment*] right to counsel, *any* waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636 (emphasis added).

This case involves the proper scope of these constitutional protections. Drawing on an isolated phrase taken out of context from this Court's opinion in *Edwards*, the Mississippi Supreme Court concluded that Minnick's Fifth and Sixth Amendment rights were not violated by *police-initiated* interrogation occurring in the absence of Minnick's appointed lawyer—even though Minnick had requested that counsel be present during interrogation and repeatedly refused to waive his rights—because Minnick consulted with his lawyer prior to the resumption of interrogation.[5]

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ment issue presented in this case, and does not affect the applicability of the ethical constraints *amicus* will discuss.

[5] The phrase on which the Mississippi Supreme Court relied is included in the following passage:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges or conversations with the police.

451 U.S. at 484-485. The context makes clear that the Court in *Edwards* had no intention of fashioning a rule permitting the police to initiate renewed custodial interrogation of a suspect who requested counsel, merely because the suspect had some opportunity to consult with a lawyer.

The precise issue for this Court, therefore, is whether, under *Edwards v. Arizona* and *Michigan v. Jackson*, a suspect who has requested counsel may be subjected to renewed (and potentially repeated) interrogation without counsel present, so long as the suspect has had the opportunity to consult with counsel prior to the renewed interrogation. Resolution of this question turns on whether prior *consultation* with counsel suffices to protect a suspect's Fifth and Sixth Amendment rights during custodial interrogation, or whether the *presence* of counsel during interrogation is essential once a suspect has decided that he or she is not able to deal with the authorities without the assistance of a lawyer. In the judgment of *amicus*, ethical principles governing attorney conduct, though not controlling, can provide substantial guidance in resolving that question.

1. To determine whether counsel's presence is necessary to protect the constitutional rights at stake, counsel's role during custodial interrogation must be examined. As the Court made clear in *Patterson v. Illinois*, the scope of the right to counsel depends on "what purposes a lawyer can serve at a particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." 487 U.S. 285, 298 (1988). The Fifth Amendment right to counsel exists to protect a suspect against compelled self-incrimination in the inherently coercive setting of custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 444-445. The Sixth Amendment right to counsel, though broader, at a

minimum includes protection against compelled self-incrimination.[6]

Although consultation with counsel can provide meaningful assistance to a suspect in custody, consultation alone cannot ensure that a defendant will make an uncoerced and wholly voluntary choice whether to speak with the police or to remain silent in the face of custodial interrogation. As this Court has recognized repeatedly, a request for counsel raises a presumption that the suspect "considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Arizona v. Roberson*, 108 S. Ct. 2093, 2099 (1988); *accord Michigan v. Mosely*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in the result). Counsel's *presence* during custodial interrogation is therefore vital. *Arizona v. Roberson* makes clear that the "right against self-incrimination . . . is protected by the prophylaxis of *having an attorney present* to counteract the inherent pressures of custodial interrogation." 108 S. Ct. at 2100 (emphasis added); *see also Edwards v. Arizona*, 451 U.S. at 484-485; *Miranda*, 384 U.S. at 444-445.[7]

Meaningful assertion of the right to remain silent "often depends upon legal advice from someone who is trained and skilled in the subject matter," because "a layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege." *Estelle v. Smith*, 451 U.S. 454, 471 (1981). For

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[6] The Sixth Amendment embodies "a realistic recognition that the average defendant does not have the professional legal skill to protect himself," and thus needs assistance when confronting a skilled advocate with antagonistic objectives. *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938).

[7] As the Court made clear in *Miranda*:

> "If an individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney *and* to have him present during any subsequent questioning."

384 U.S. at 474 (emphasis added).

this reason, the Court in *Fare v. Michael C.* stressed that the attorney's *presence* is indispensable to protect the right to be free of compelled self-incrimination:

> the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, . . . the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system established by the Court.

442 U.S. 707, 719 (1979) (internal quotation omitted); *accord Arizona v. Roberson*, 108 S. Ct. at 2098 n.4. The Court has explicitly acknowledged that counsel's presence during custodial interrogation "helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence." *Fare v. Michael C.*, 442 U.S. at 719. It is for precisely these reasons that "*Miranda* warnings" inform a suspect of *both* the right to consult with counsel *and* the right to have counsel present during custodial interrogation.

Accordingly, this Court's consistent understanding of counsel's role in protecting a suspect's rights during custodial interrogation makes clear that the right to counsel cannot be "satisfied" merely by providing a suspect the opportunity to consult with a lawyer prior to renewed, and potentially repeated, police interrogations. A suspect's need for the *presence* of an attorney, which both the Fifth and Sixth Amendments guarantee in the circumstances of this case, does not simply evaporate once the suspect has communicated with a lawyer. That right

remains crucial to protecting a suspect's core right to remain silent during custodial interrogation.[8]

2. The ethical principles governing the legal profession shed considerable light on the critical constitutional inquiry into "what purposes a lawyer can serve at the stage of the proceedings in question, and what assistance he could provide to an accused at that stage." *Patterson v. Illinois*, 487 U.S. at 298. In the present context, the ethical canons and rules strongly reinforce the conclusion that counsel's presence, not mere consultation with counsel prior to interrogation, is essential to safeguard the rights of a suspect who has decided he or she needs the assistance of a lawyer in dealing with the authorities. Since at least 1909, ethical canons have prohibited direct contact between an attorney and an adverse party. Ethical Canon 7-18 of the American Bar Association's Model Code of Professional Responsibility presently sets forth the proper bounds of the relationship between counsel and an adverse party. It provides:

> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.

[8] This Court's prior rulings would seem to have made clear that *Edwards* established a "bright-line" prohibition of police-initiated interrogation of a defendant in custody who has invoked the right to have counsel present. *See Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam) ("courts may admit his response to further questioning *only* on finding that he (a) initiated further discussions with the police, *and* (b) knowingly and intelligently waived the right he had invoked." (emphasis added)). *See also Arizona v. Roberson*, 108 S. Ct. at 2097-2098; *Solem v. Stumes*, 465 U.S. 638, 646 (1984); *Oregon v. Bradshaw*, 462 U.S. at 1042.

EC 7-18, *in* American Bar Foundation Annotated Code of Professional Responsibility 331 (1979). Disciplinary Rule 7-104, which implements this canon, provides:

> (A) During the course of his representation of a client, a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

DR 7-104(A)(1), *id.* at 331. These ethical prohibitions were in force in Mississippi at the time of Denham's interrogation of Minnick.[9]

The ethical prohibition against contacts between counsel and an adverse party aims to prevent a lawyer from "nullifying the protection a represented person has achieved by retaining counsel."[10] It is intended "to protect a defendant from the danger of being tricked into giving his case away through opposing counsel's artfully crafted questions." *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983). Counsel will generally know exactly what admissions by an adversary will ensure legal victory, and will often be skilled in the arts of eliciting such admissions. A person unschooled in the law, by contrast, may well have no sense of what facts may be material to his or her legal case, and may therefore unwittingly concede damaging points or omit material points.

[9] Subsequently, Mississippi adopted the Model Rules of Professional Conduct, which do not differ materially on this point. Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

[10] Comments to Model Rule 4.2.

Direct contacts between an attorney and an adverse party also threaten the attorney-client relationship and the privilege that surrounds it. The American Bar Association long ago identified this risk when it concluded that the prohibition of contacts between counsel and an opposing party "arise[s] out of the nature of the relation of attorney and client and [is] equally imperative in the right and interest of the adverse party and of his attorney." ABA Committee on Ethics, *Formal Opinion 108* (1934).[11] A nonlawyer may well lack sensitivity to the scope of privileges that protect his communications with counsel. Direct communication between such a person and counsel for that person's adversary could therefore easily lead to invasion of privileged areas. Such communications can also serve to drive a wedge between a party and his or her lawyer. Statements by a party to opposing counsel may effectively commit the party to a particular line of defense, and thus usurp the role of the lawyer in shaping that defense.

The ethical rules are thus designed to exclude contact between a lawyer and an adverse party, not merely to ensure that the adverse party has had the benefit of a lawyer's advice before communicating with the opposing lawyer. The rules recognize that the potential for overreaching inheres in the *interaction* between a skilled attorney and a typically naive opposing party. The rules prohibit such interaction because it simply poses too great a risk to the integrity of the adversary system and the sanctity of the attorney-client relationship.[12]

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[11] This Court has recognized intrusion into the attorney-client relationship diminishes "sound legal advice or advocacy," and in turn undermines "broader public interests in the . . . administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[12] As this Court has repeatedly acknowledged, "partisan advocacy on *both sides* of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronic*, 466 U.S. 648, 655 (1984); *Herring v. New York*, 422 U.S. 853, 862 (1975); *Penson v. Ohio*, 109 S. Ct. 346 (1988).

The American Bar Association has recently reaffirmed that these concerns apply with full force in the context of criminal proceedings. *See* ABA House of Delegates Report No. 301 (approved February 12-13, 1990). Indeed, as the Tenth Circuit recently observed, "[i]t is now well settled that DR 7-104(A)(1) applies to criminal prosecutions as well as civil litigation." *United States v. Ryan*, 1990 Westlaw 58119 (10th Cir. May 8, 1990); *see also, e.g., United States v. Hammad*, 858 F.2d 834, 837-38 (2d Cir. 1988); *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1051 (1981); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 898 (1976); *State v. Yatman*, 320 So.2d 401, 403 (Fla. Dist. Ct. App. 1975); ABA Standards Relating to the Administration of Criminal Justice, Standard 3-4.1 (commentary); American Bar Foundation Annotated Code of Professional Responsibility, at 339 ("There is no doubt that DR 7-104(A)(1) applies to public prosecutors"); Ethics Committee of the American Bar Association, *Informal Opinion 1373* (December 2, 1976).

Courts have quite properly been reluctant to extend DR 7-104(A)(2)'s prohibition to all contacts resulting from official investigation of a criminal suspect prior to formal commencement of adversary proceedings.[13] There

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[13] It may well be consistent with the ethical rule, for example, to permit undercover operations or other direct noncustodial contacts with suspects, even though the State is on notice that the suspect is represented by counsel. Precluding all such contact may "afford too much power to defense lawyers and targets to frustrate investigations that are legitimately in progress as well as those into ongoing or future crimes." Gillers, *Ethical Questions for Prosecutors in Corporate Crime Investigations*, New York Law Journal, Sept. 6, 1988 at 1. Cognizant of this problem, courts have struggled to define the proper scope of DR 7-104(A)(1) to the investigatory stage of criminal proceedings. Compare, e.g., *United States v. Hammad*, 846 F.2d 854, 857 (2d Cir. 1988), *modified* 858 F.2d 834

is no question, however, that *custodial* interrogation of a defendant known to be represented by counsel falls well within the rule's prohibitory scope, even if the interrogation precedes indictment or other formal commencement of the adversary process. *See, e.g., United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973). As these cases make clear, the risk of overreaching is particularly acute in the context of custodial interrogation. The coercive pressures of the custodial setting exacerbate the usual risks inherent in interaction between counsel and an opposing party.[14]

The ethical prohibition applies fully to police officers when they act as agents for prosecuting attorneys. On its face DR 7-104(A)(1) prohibits not only direct communications between an attorney and an adversary party, but also "caus[ing] another to communicate" with an adversary. The Ethics Committee of the American Bar Association long ago concluded that the prohibition governs conduct of law enforcement personnel acting as agents of the prosecution. *See* American Bar Association Ethics Committee, *Formal Opinion 95* (May 3, 1933).[15]

(rule prohibits direct contacts with represnted party before indictment if party knows he or she is subject of investigation) and *United States v. Jamil*, 546 F. Supp. 646, 657 (E.D.N.Y. 1982), with *United States v. Ryan*, 1990 Westlaw 58119 (10th Cir. May 8, 1990) (limited application before indictment); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (same).

[14] Application of the rule in that circumstance does not substantially burden the process of criminal investigation. Law enforcement officials remain free to seek information through proper undercover activity, and to confer with a suspect in the absence of counsel in a noncustodial setting.

[15] Commentators and courts have recognized that a police "interrogator may be considered an agent of the local prosecuting attorney, . . . partly because the dangers that a police interrogator will

The ethical rules applicable to interactions between lawyers or their agents and adverse parties represented by counsel thus make clear that the presence of the adverse party's counsel is essential to prevent overreaching, and that the rule applies with full force in the criminal context. The Fifth and Sixth Amendment rules set forth in *Edwards v. Arizona* and *Michigan v. Jackson* were meant to guard against precisely the kinds of overreaching that the ethical rules also seek to prevent. That the ethical rules recognize a need to prevent direct interaction between lawyers and opposing parties in order to guard against overreaching is powerful evidence that adequate protection of a defendant's Fifth and Sixth Amendment rights requires counsel to be present for any

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threaten or deceive a suspect are obviously at least as great as those that a lawyer will do so." Leubsdorf, *Communicating With Another Lawyer's Client*, 127 U. Pa. L. Rev. 683, 701 (1979). And federal appellate courts have recognized that DR 7-104(A)(1) applies "'to non-attorney law enforcement officers when they act as the alter ego of government prosecutors.'" *United States v. Hammad*, 858 F.2d at 838 (quoting *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983)); *see also United States v. Four Star*, 428 F.2d 1406 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970).

In the present case, Deputy Denham may have been acting as an agent for Mississippi's prosecuting attorneys. The involvement of prosecutors in Minnick's case at the time of Denham's interrogation of Minnick is apparent. Extradition had been requested, and extradition papers were prepared by members of the district attorney's office in Clarke County, Mississippi. And once counsel for the State was involved in any substantial respect, the ethical prohibitions apply even if counsel did not specifically direct Denham to seek a confession from Minnick outside the presence of Minnick's attorney. Prosecutors are under an ethical obligation to ensure that nonlawyers assisting them in investigation and prosecution respect relevant ethical obligations. *See In re Yacazino*, 494 A.2d 801 (N.J. 1985); *In re Weinberg*, 518 N.E.2d 1037 (Ill. 1988); *In re Fata*, 254 N.Y.S.2d 289, *appeal denied*, 260 N.Y.S.2d 1027 (N.Y. App. Div., 1st Dep't 1964); *In re Brown*, 59 N.E.2d 855 (Ill. 1985). In the present case, this obligation would have required them to ensure that interaction with Minnick did not transgress applicable ethical prohibtions, including DR 7-104.

custodial interrogation occurring after a suspect has asked for counsel.[16]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Petitioner, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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June 28, 1990

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[16] As Justice Stevens has observed:

> [a]n attempt to obtain evidence for use at trial by going behind the back of an adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice. In the criminal context, . . . notions of fairness that are at least as demanding should also be enforced.

Patterson v. Illinois, 108 S. Ct. at 2400 (Stevens, J., dissenting).

No. 89-6332

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

Robert S. Minnick,

Petitioner,

v.

State of Mississippi,

Respondent.

On Writ of Certiorari to the
Mississippi Supreme Court

MOTION FOR LEAVE TO FILE AMENDED BRIEF AMICUS CURIAE

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*Counsel of Record

Dated: September 13, 1990

No. 89-6332

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

Robert S. Minnick,

Petitioner,

v.

State of Mississippi,

Respondent.

On Writ of Certiorari to the
Mississippi Supreme Court

The Mississippi State Bar, through counsel, respectfully moves for leave to file an amended brief amicus curiae in support of petitioner in the above matter. The amended brief, copies of which are submitted herewith, does not add any material not contained in the brief originally submitted; a portion of the original brief is, however, deleted. In support of this motion, the Mississippi State Bar states as follows:

1. The Mississippi State Bar is a unified bar, which by law encompasses every person licensed to practice law in the State of Mississippi. The Bar was founded in 1909 as a voluntary bar and became a unified bar in 1932 as a

result of action by the state legislature. The Bar functions as the disciplinary arm of the Mississippi Supreme Court.

2. On June 28, 1990, the Mississippi State Bar filed with this Court a Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in support of petitioner in the above matter.

3. Filing of that motion and accompanying brief was approved by vote of the Board of Commissioners of the Mississippi State Bar on June 22, 1990. See Affidavit of Leonard A. Blackwell II, September 11, 1990 (attached as Exhibit A to this Motion).

4. Subsequent to the filing of the motion and brief, the Board of Directors became aware that a portion of the membership of the Bar opposed some of the positions advanced in the brief as filed. Id.

5. Because the Mississippi State Bar is a unified bar, opposition by these members raises important questions, especially in light of this Court's recent decision in Keller v. State Bar of California, No. 88-1905.

6. Although all legal services and disbursements in this matter were provided to the Bar pro bono publico, and thus no portion of membership dues was used to finance the brief, there remains a serious question after Keller whether a unified bar may constitutionally advocate a position opposed by a part of its membership.

7. Accordingly, the Bar may inadvertently have violated the First Amendment rights of some of its members.

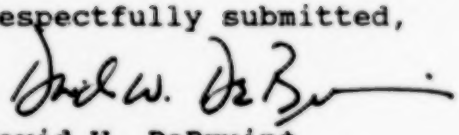
8. The Board of Commissioners therefore decided at its scheduled meeting on September 7, 1990 to seek leave of this Court to file an amended brief amicus curiae. See Blackwell Affidavit at ¶¶ 10-12.

9. The Mississippi State Bar believes that the present situation presents "extraordinary circumstances" justifying submission of the brief notwithstanding potential timeliness problems. See Supreme Court Rule 30.2. The amended brief amicus curiae does not contain any material that did not appear in the original brief filed with this Court, but simply omits the discussion appearing on pages 7-10 of the initial brief filed with this Court.

10. The Mississippi State Bar recognizes that the instant request is unusual, and regrets any convenience caused the Court by the timing of the filing of the amended brief amicus curiae, but seeks the indulgence of this

Court to permit filing of the amended brief for the reasons set forth in this motion.

Respectfully submitted,



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Dated: September 13, 1990

AFFIDAVIT OF LEONARD A. BLACKWELL II

Leonard A. Blackwell II, being duly sworn, testifies as follows:

1. I am an attorney admitted to practice law in the State of Mississippi. I received my J.D. from the University of Mississippi Law School in 1966. I am currently the president of the Mississippi State Bar. I am also a member of the Harrison County and American Bar Associations, the Mississippi Trial Lawyers Association, the Association of Trial Lawyers of America, the American Board of Trial Advocates and a fellow of the Mississippi Bar Foundation. I was admitted to the bar of this Court in 1974.

2. I submit this affidavit in support of the Mississippi State Bar's motion for leave to file an amended brief amicus curiae in in Minnick v. Mississippi, No. 89-6332.

2. In June 1990, I was approached by counsel for the petitioner in Minnick v. Mississippi about the possibility of the Mississippi State Bar submitting a brief amicus curiae before the Supreme Court of the United States in support of petitioner Minnick.

3. The Mississippi State Bar considered that request because it implicated the ethical prohibitions set forth in the Model Code of Professional Conduct, which the Bar is charged with administering in Mississippi.

4. On June 22, 1990, a majority of the Board of Commissioners of the Mississippi State Bar voted to submit a brief amicus curiae in support of petitioner. Under the

bylaws of the Mississippi State Bar, the Board possessed the authority to approve the filing of the brief.

5. Through the efforts of counsel for petitioner, the law firm of Jenner & Block was retained as counsel pro bono publico to represent the Bar in the filing of this brief.

6. On or shortly after June 22, 1990, I personally reviewed a draft of the brief prepared by Jenner & Block attorneys, as did other members of the Board of Commissioners.

7. On June 26, 1990, Mr. Larry Houchins, Executive Director of the Bar, informed counsel for petitioner by letter that the "the Board of Commissioners of the Mississippi State Bar authorized the law firm of Jenner & Block to file and Amicus Curiae Brief on hehalf of the Bar in Minnick v. State." A copy of that letter is attached to this affidavit as Exhibit A. A copy of the letter was also sent to Jenner & Block by telecopier on June 26th.

8. Subsequent to the filing of the brief on June 28, 1990, the Bar received complaints from some of its members, disagreeing with the Bar's advocacy in the brief. In particular, some members disagreed with the constitutional analysis undertaken on pages 7 to 10 of the original brief.

9. In the view of the Board of Commissioners, this expression of opposition raised serious issues under the Supreme Court's recent decision in Keller v. State Bar of California, No. 88-1905 (June 4, 1990). The Mississippi

State Bar is a unified bar; by law, all attorneys admitted to practice in Mississippi must be members. Accordingly, the opposition of some members to a portion of the amicus brief raised a serious First Amendment issue.

10. The Board of Commissioners determined that the most prudent course would be to seek to amend the brief filed with this Court rather than risk violating the First Amendment rights of members or jeopardizing the Bar's status as a unified bar.

11. Accordingly, the Board of Commissioners voted, at its meeting on September 7, 1990, to seek leave to file an amended brief amicus curiae, and instructed counsel to file the instant motion for leave to file an amended brief amicus curiae.

12. The Mississippi State Bar has approved the amended brief amicus curiae filed on its behalf with the instant motion.

13. The Mississippi State Bar accepts full responsibility for the need for this action, and regrets any inconvenience caused this Court.

Leonard A. Blackwell, II

Subscribed to and sworn before
me this 11th day of September, 1990

Notary Public
my commission Expires: 11/14/92

MSB
MISSISSIPPI
STATE BAR
Larry Houghins
Executive Director

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June 26, 1990

Mr. Clive A. Stafford Smith
185 Walton St., N.W.
Atlanta, Georgia 30303

Dear Mr. Smith:

I am writing to confirm that the Board of Commissioners of the Mississippi State Bar authorized the law firm of Jenner and Block to file an Amicus Curiae Brief on behalf of the Bar in Minnick v. State.

Sincerely yours,

Larry Houghins
Executive Director

LH:dmw

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1990, a copy of the foregoing Motion for Leave to File Amended Brief Amicus Curiae was delivered by first-class mail, postage-prepaid, to the following parties:

Floyd Abrams, Esq.
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David W. DeBruin